No. 5703

United States Circuit Court of Appeals

For the Ninth Circuit.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Appellant,

vs.

H. A. LINDQUIST and SELMA A. LINDQUIST,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Attorneys for Appellant:

BUTLER, VAN DYKE & DESMOND, Esqs.,
EDWARD P. KELLY, Esq.,
Sacramento, Calif.

Attorneys for Appellees:

RALPH H. LEWIS, Esq.,
GEORGE E. McCUTCHEN, Esq.,
Sacramento, Calif.

In the Northern Division of the District Court of the United States, in and for the Northern District of California.

H. A. LINDQUIST and SELMA A. LINDQUIST,
Plaintiffs,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,
Defendant.

COMPLAINT.

Plaintiffs complaining allege:

I.

That defendant is now, and was at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota.

II.

That plaintiffs are citizens and residents of the State of California; that defendant is a resident of the State of Minnesota and the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

III.

That on and prior to the 29th day of September, 1921, plaintiffs were residing in St. Paul, Minnesota, were wholly unfamiliar with California farm and fruit lands, the nature, quality and values thereof and in all negotiations hereinafter referred to were compelled to rely, and did rely, entirely upon the statement and representations of defendant with respect thereto.

IV.

That defendant well knew of the unfamiliarity of plaintiffs with each of the matters and things contained in the representations hereinafter set forth and with intent to cheat [1*] and defraud plaintiffs by inducing them to enter into the contract hereinafter referred to falsely and fraudulently stated and represented to plaintiffs that all of the 10-acre tracts of land in the County of Sacramento, State of California, then being sold by defendant were, and particularly that that certain real property in the County of Sacramento, State of California, described as Lot No. 19 of Vineland, according to the official map or plat thereof, was of the fair and reasonable value of $275.00 per acre; that all

*Page-number appearing at the foot of page of original certified Transcript of Record.

of the land thereof was rich and fertile and was capable of producing all sorts of farm crops and products; that said land was entirely free from all conditions and things injurious or harmful to the growth of fruit-trees; that said land was perfectly adapted to the raising of fruits of all kinds in commercial quantities; that said land was capable of producing large crops of any kind of deciduous fruit planted thereon, and that said crops were of the finest quality.

V.

That plaintiffs relied solely upon said representations, and each of them, and believed the same to be true and solely by reason thereof entered into a contract with defendant on or about said 29th day of September, 1921, whereby defendant agreed to sell and plaintiffs agreed to purchase the 10-acre tract of land above described at a price of $3,250.00.

VI.

That plaintiffs well and faithfully did and performed all the terms, covenants and conditions of said contract on their part to be performed and on or about the 30th day of October, 1923, defendant deeded said real property to plaintiffs and plaintiffs paid a balance thereon and in so doing executed a promissory note for $1,150.00 to the F. A. Bean Foundation, Inc., a corporation, and secured the same by a first deed of trust upon said land and further and as the [2] balance of the agreed purchase price of said land executed three notes for a total of $1,000.00 and a deed of trust to defendant

herein. That said three notes were fully paid on and prior to the 25th day of October, 1926.

VII.

That it was not then, there, at any time, or at all true that said land above described, or any of said parcels of land, were, or was, of the value of $275.00 per acre, or that any portion thereof was worth in excess of $15.00 per acre and/or that any of said land was fertile and/or would produce any crops in commercial quantities and/or was at all adapted to the growing of fruits or fruit-trees and/or that trees of any kind would grow, thrive or flourish thereon.

VIII.

That said representations were, and each of them was, at the time of the making thereof false and untrue and were at said times known to defendant to be false and untrue and were made solely for the purpose of cheating plaintiffs out of their money by inducing them to enter into said contract and to make said payments.

IX.

That plaintiff did not discover the falsity of said representations, or any of them, until January, 1928, and prior thereto and because of their reliance thereon plaintiffs expended moneys in the improvement of said described real property and bestowed labor thereon. That in so doing plaintiffs constructed a house thereon at an expense of $1,000.00, installed pumps at an expense of $757.00, built chicken-houses at an expense of $450.00, plowed and levelled said land at an expense of $300.00, put

a lawn about the house on said property at an expense of $100.00, blasted for and planted trees at an expense of $200.00, installed water pipes for irrigation and domestic use at an expense [3] of $300.00, built fences at an expense of $100.00, put in electric wiring at an expense of $50.00 and bestowed work and labor upon said property of the actual and reasonable value of $6,500.00. That each of the said sums was the actual, necessary and reasonable expense of each of said items.

X.

That in making said improvements and attempting to make said place produce, as aforesaid, plaintiffs have so expended in money and work and labor $9,757.00, paid to defendant $3,250.00, plus interest, and plaintiffs have so expended upon said property $13,007.00. That had said property been as represented said moneys would have been property expended thereon and said property would have been worth the said total cost thereof *and said property would have been worth the said total cost thereof buy* by reason of the fraud and deceit of defendant, as aforesaid, and of the falsity of said representations said land as improved is not worth in excess of $1,000.00 and plaintiffs have thereby been damaged in the sum of $12,007.00.

XI.

That said acts of defendant, and each of them, and defendant's whole course of conduct was unlawful, malicious, fraudulent and oppressive and a reasonable sum to be allowed plaintiffs as *punitive therefor* is $5,000.00.

WHEREFORE, plaintiffs pray judgment for $17,007.00, for plaintiffs' costs of suit and for such other and further relief as to the Court shall seem meet and proper.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs. [4]

State of California,
County of Sacramento,—ss.

H. A. Lindquist, being duly sworn on oath, says he is one of the plaintiffs in the above-entitled matter and that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

W. A. LINDQUIST.

Subscribed and sworn to before me this 3d day of February, 1928.

[Seal] GEORGE E. McCUTCHEN,
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed Feb. 6, 1928. [5]

[Title of Court and Cause.]

DEMURRER TO COMPLAINT.

Now comes defendant above named, and demurs to the complaint of plaintiffs on file herein, and for grounds of demurrer alleges as follows:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is uncertain in this, that it does not appear therefrom what facts were discovered by plaintiffs in January of 1928, or thereafter, from the discovery of which plaintiffs allege that they became informed of the alleged falsity of said representations; nor can it be ascertained therefrom what was the nature or character of the work and/or labor bestowed upon said property as alleged in plaintiffs' complaint; nor can it be ascertained therefrom the quantity of labor so bestowed.

III.

That said complaint is ambiguous and unintelligible for each of the reasons hereinabove given for its being uncertain.

IV.

That this action and cause of action is barred under the provisions of Section 338 and of Subdivision 4 thereof of the Code of Civil Procedure of the State of California. [6]

WHEREFORE, defendant prays that plaintiffs take nothing by their action herein, and that it be hence dismissed with its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 16, 1928. [7]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Monday, the 12th day of March, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—MARCH 12, 1928—ORDER OVERRULING DEMURRER.

After hearing the attorneys, IT IS ORDERED that the demurrer to complaint be overruled, with leave to answer within 20 days. [8]

[Title of Court and Cause.]

ANSWER.

Now comes defendant above named, and answering plaintiffs' complaint, admits, denies and alleges as follows, to wit:

I.

Admits the allegations contained in Paragraphs I and II of plaintiffs' complaint.

II.

Denies that in the negotiations for the purchase of California lands, as set forth in plaintiffs' complaint, plaintiffs, or either of them, were compelled

to rely, or did rely upon the statements and/or representations of defendant with respect thereto.

Admits that on the 29th of September, 1921, plaintiffs were residing in St. Paul, Minnesota.

Concerning the allegations that plaintiffs were then wholly unfamiliar with California farm and fruit lands, their nature, quality and values, defendant alleges it has not sufficient information or belief to enable it to answer the same, and upon that ground and for that reason it denies, both generally and specifically each and all of said allegations. [9]

III.

Admits that on the 29th day of September, 1921, plaintiffs and defendant entered into a contract, whereby defendant agreed to sell and plaintiffs to purchase the ten-acre tract of land described in Paragraph IV of plaintiffs' complaint.

IV.

Admits that on the 30th day of October, 1923, defendant deeded said real property to plaintiff; denies that at said time plaintiffs paid the balance due upon said contract of purchase; admits that at said time plaintiffs executed a promissory note for Eleven Hundred Fifty ($1150.00) Dollars, to the F. A. Bean Foundation, Inc., a corporation, and secured the same by a first deed of trust upon said land; admits that plaintiffs at said time also executed three notes for a total of One Thousand ($1,000.00) Dollars, to defendant, and secured the same by a second lien deed of trust, and that said three notes have been duly paid.

V.

Concerning the allegations in Paragraph IX of plaintiffs' complaint to the effect that plaintiffs constructed a house on said real property at an expense of $1,000.00; installed pumps at an expense of $757.00; built chicken-houses at an expense of $450.00; plowed and levelled said land at an expense of $300.00; put in a lawn at an expense of $100.00; blasted for and planted trees at an expense of $200.00; installed water pipes for irrigation and domestic use at an expense of $300.00; built fences at an expense of $100.00; put in electric wiring at an expense of $50.00, and bestowed labor thereon at a value of $6,500.00, and that each of said sums was the actual, necessary and reasonable expense of each of said items, defendant alleges it has not sufficient information or belief upon or concerning the same to enable it to answer, and therefore, denies [10] both generally and specifically, each and all of said allegations, but in this connection defendant admits that plaintiffs constructed a house on said property, installed pumps, built chicken-houses, plowed and levelled the land, put in a lawn, blasted for and planted trees, installed water pipes, built fences, and put in electric wiring.

VI.

Defendant admits that in the manner hereinbefore alleged, plaintiffs paid a total of $3,250.00, plus interest, for said property.

VII.

Defendant denies each and all of the allegations

of plaintiffs' complaint not hereinabove denied for want of information or belief, or not hereinabove expressly admitted.

Further answering plaintiffs' complaint, and as a further defense thereto, defendant alleges:

That this action and cause of action is barred under the provisions of Section 338 of the Code of Civil Procedure of the State of California, and of Subdivision 4 thereof.

As a separate and further defense to plaintiffs' complaint, defendant alleges, that if any misrepresentations were made concerning the value, quality or characteristics of the real property purchased by plaintiffs from defendant, that the same were waived for the following reasons, to wit:

That after plaintiffs discovered the quality, characteristics and value of said land, plaintiffs became and were in default under the terms and provisions of said contract of purchase; that said defaults of plaintiffs consisted of the following, that is, that on January 1st, 1923, when, pursuant to the terms of said contract, there was due an annual payment of $530.00, with interest, [11] plaintiffs failed to make the same; that in spite of said default plaintiffs procured from defendant, leave to continue with the performance of said contract, and defendant allowed said contract to remain in force and effect and did not declare a forfeiture thereof; that on November 1st, 1923, while plaintiffs still remained in default as aforesaid, it was agreed between the parties to said contract, that the sum of the indebtedness owing from plaintiffs to defend-

ant should be changed and that the amount of annual payment required should be reduced, and pursuant to said agreement, and at the request of plaintiffs and under the consent of defendant, the sum of the said indebtedness and of the security therefore, was changed as follows:

Plaintiffs executed a promissory note in the sum of $1,150.00, to the F. A. Bean Foundation, Inc., a corporation, and secured the payment of the same by a first lien deed of trust upon said real property, the legal title thereto having been conveyed to plaintiffs by defendant. Said promissory note was by its terms due in five years and bore interest at the rate of seven per cent, payable quarterly. The balance of said indebtedness due defendant was at said time to be handled as follows:

Plaintiffs were to pay the sum of $654.59 in cash at the time the deed was passed, and execute their promissory note for One Thousand Dollars, secured by a second lien deed of trust upon said real property; that plaintiffs did execute said promissory note and deed of trust, but failed to pay said sum of $654.59, and defendant, at the request of plaintiffs, permitted said sum of $654.59 to remain unpaid until November, 1924, at which time plaintiffs paid the sum of $750.00 to apply on account; that during all of said negotiations, after the making of said contract, plaintiffs [12] concealed from defendant the fact that they were claiming to have been, or believed themselves to have been defrauded in the making of said contract.

WHEREFORE, defendant prays that plaintiffs take nothing by their said action herein, and that defendant have and recover of and from plaintiffs its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant. [13]

State of California,
County of Sacramento,—ss.

L. B. Schei, being duly sworn, deposes and says: That he is an officer, to wit, the resident secretary of Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the within entitled action; that he makes this affidavit for and on behalf of said corporation defendant; that he has read the foregoing and annexed answer and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters as are therein stated upon information or belief, and as to such matters he believes it to be true.

L. B. SCHEI.

Subscribed and sworn to before me this 24th day of April, 1928.

[Seal] A. E. WEST,
Notary Public in and for the County of Sacramento, State of California.

Service hereof is hereby admitted and receipt of copy acknowledged this 24th day of April, 1928.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Pltf.

[Endorsed]: Filed Apr. 24, 1928. [14]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Tuesday, the 16th day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT—OCTOBER 16, 1928—TRIAL.

This case came on regularly this day for trial. Geo. E. McCutchen and Ralph Lewis, Esqrs., appearing as attorneys for the plaintiffs and E. P. Kelly and J. W. S. Butler, Esqrs., appearing as attorneys for the defendant. Thereupon the following named persons, viz.:

Jacob Kammerer,	Nochell Cirincion,
Emil A. Hintz,	John D. Greene,
Robert Blume,	Henry Morgan,
C. R. Fairfield,	Gordon Dinney,
Dave Mullen,	A. H. Griesel and
John Jurach,	Milo Dye,

twelve good and lawful jurors, were, after being duly examined upon their oaths, sworn to *tey* the issues joined herein. Counsel for both sides made their opening statements to the Court and jury. H. A. Lindquist, Selma A. Lindquist, John A. Lind-

quist, Howard D. Kerr, Adolph Stern, H. L. Frederickson, and Herbert C. Davis were sworn and testified on behalf of the plaintiffs and the plaintiffs introduced in evidence and filed its exhibits marked Nos. 1, 2, 4 and 5 and the plaintiffs rested. Lambert Hagel, John Posehn, F. E. Unsworth, H. F. Bremer, J. Geddes, Louie Terkelson, H. S. Wanzer, Walton Holmes, E. E. Amblad, Arthur Morley, and F. E. Twining were [15] sworn and testified on behalf of the defendant and the defendant introduced in evidence and filed its exhibits marked Nos. 3, 6, 7, 8, 9, 10 and 11 and the defendant rested. Herbert C. Davis was recalled in rebuttal and James B. Leach, Ida E. Perra and John V. Krall were sworn and testified on behalf of the plaintiff, and the plaintiff again rested. Defendant made and filed a motion for a directed verdict, which motion was ORDERED denied. After argument by the counsel and the instructions of the Court to the jury, the jury at 5:15 o'clock P. M. retired to deliberate upon their verdict. ORDERED that the jury be committed to the custody of the U. S. Marshal until such time as they shall have agreed upon a verdict. The verdict shall be signed by the foreman and sealed in an envelope and kept in the custody of the Foreman, and the jury shall report its verdict to the Court on Wednesday, October 17th, 1928, at 10 o'clock A. M. [16]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Wednesday, the 17th day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT — OCTOBER 17, 1928— TRIAL (RESUMED).

The parties hereto and the jury impaneled herein being present as heretofore the trial was thereupon resumed. The jury was thereupon asked if they had agreed upon a verdict and through their foreman answered in the affirmative, and thereupon presented a sealed verdict which was opened in the presence of the jury and read and which verdict was ORDERED recorded as follows, viz.:

"We, the jury, find in favor of the plaintiffs and against the defendant, and assess the plaintiffs' damages at $1800.00.

Dated: October 17th, 1928.

MILO E. DYE,
Foreman."

and the jury being asked if said verdict is their verdict, each juror replied that it is. ORDERED that jurors Jacob Kammerer and Milo Dye be ex-

cused until Tuesday, November 13th, 1928, at 10 o'clock A. M. FURTHER ORDERED that all other jurors in attendance this day be excused from further service upon this court. [17]

[Title of Court and Cause.]

VERDICT.

We, the jury, find in favor of the plaintiffs and against the defendant, and assess the plaintiffs' damages at $1,800.00.

MILO E. DYE,
Foreman.

Dated: October 17th, 1928.

[Endorsed]: Filed Oct. 17, 1928, at 10 A. M. [18]

In the Northern Division of the United States District Court for the Northern District of California.

No. 473—LAW.

H. A. LINDQUIST and SELMA A. LINDQUIST,
Plaintiffs,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,
Defendant.

JUDGMENT.

This cause having come on regularly for trial on the 16th day of October, 1928, being a day in the October, 1928, Term of said Northern Division of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein, Geo. E. McCutchen and Ralph Lewis, Esqrs., appearing as attorneys for the plaintiffs and J. W. S. Butler and E. P. Kelly, Esqrs., appearing as attorneys for the defendant; and the trial having been proceeded with on the 16th and 17th days of October, 1928, in said Term, and evidence, oral and documentary, upon behalf of the respective parties having been introduced and closed and the cause after arguments of the attorneys and the instructions of the Court having been submitted to the jury, the jury having subsequently rendered the following verdict, which was ORDERED recorded, to wit:

> "We, the Jury, find in favor of the Plaintiffs and against the Defendant, and assess the Plaintiffs' damages at $1800.00.
>
> Dated: October 17th, 1928.
>
> MILO E. DYE,
> Foreman."

and the Court having ORDERED that judgment be entered in accordance with said verdict: [19]

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,—

IT IS ORDERED AND ADJUDGED that the plaintiffs, H. A. Lindquist and Selma A. Lindquist,

do have and recover of and from the defendant Sacramento Suburban Fruit Lands Company, a corporation, the sum of Eighteen Hundred ($1800.00) Dollars, and for costs taxed at $39.10.

Judgment entered this 17th day of October, 1928.

WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [20]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States for the Northern District of California:

Now comes the defendant, Sacramento Suburban Fruit Lands Company, a corporation, by its attorneys, and respectfully shows:

That the defendant, feeling aggrieved by the verdict and judgment thereon in said cause rendered on the 17th day of October, 1928, in favor of plaintiffs and against defendant, for the sum of One Thousand Eight Hundred ($1800.00) Dollars, damages, and costs amounting to Thirty-nine and 10/100 ($39.10) Dollars, hereby petitions the Court for an order allowing the defendant to appeal to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and that a citation be issued as provided by law, and that a transcript

of the record upon which said judgment was based be sent to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that all further proceedings in this court be suspended and stayed until the determination of the appeal, and that an order be made fixing the amount of surety which said defendant shall give upon this appeal.

Dated: November 24, 1928.

J. W. S. BUTLER,
Of BUTLER, VAN DYKE and DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant. [21]

Service hereof is hereby admitted and receipt of copy acknowledged this 26th day of November, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Nov. 26, 1928. [22]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the above-entitled cause, and makes and files the following assignment of errors, upon which it will rely in its prosecution of the appeal from the verdict and the judgment thereon, herein made and entered

on the 17th day of October, 1928, in favor of the plaintiffs, and against this defendant:

I.

The Court erred in overruling defendant's demurrer to the complaint filed in the above-entitled cause.

II.

The Court erred in admitting in evidence a certain book (Plaintiffs' Exhibit 1) and in overruling defendant's objection thereto, as follows:

"Q. Did you, in some way, get one of these books? A. Yes.

Mr. McCUTCHEN.—Mr. Butler, have you a copy of this book that is not marked up?

Mr. BUTLER.—We have only one, which is for our own use. [23]

Mr. McCUTCHEN.—Q. The book did not have any pencil markings in it when you got it, did it?

A. I don't remember.

Q. Well, you don't remember any pencil markings in it, do you? A. No.

Mr. McCUTCHEN.—We offer this book in evidence, solely for the purpose of showing the representations made to these plaintiffs. We do not contend there were any pencil markings in the book when the plaintiff got it.

Mr. KELLY.—The offer is objected to on the ground that if it is offered for any purpose, the whole book is necessary in order that the representations for which the offer is made may be correctly interpreted and construed, and un-

less the book is offered as a whole we object to it for that reason.

The COURT.—Objection overruled.

Mr. KELLY.—Exception.

Mr. McCUTCHEN.—We do offer the whole of the book for the purpose of showing the representations. We have not picked out any particular part of it.

(Plaintiffs' Exhibit 1.)"

III.

The Court erred in denying defendant's motion for a directed verdict, as follows:

"Mr. BUTLER.—I desire to make a motion if the Court please, for a directed verdict. I move the Court to instruct the jury to render a verdict in favor of the defendant upon the following grounds: [24]

(1) That the evidence is insufficient to show that the defendant deceived or defrauded plaintiffs in making the contract referred to in the plaintiffs' complaint for the purchase by plaintiffs from defendant of land.

(2) That the evidence is insufficient to show that defendant misrepresented the quality or character of the land purchased by plaintiffs from defendant, or the value thereof.

(3) That the evidence is insufficient to show that plaintiffs have been damaged by any act on the part of the defendant.

(4) That the evidence shows affirmatively that plaintiffs' cause of action is barred by the provisions of Section 338, and of Subdivision 4 thereof,

of the Code of Civil Procedure of the State of California, and that the evidence is insufficient to show that plaintiffs' cause of action is not barred by said above-quoted provision of said section of said code.

The COURT.—The evidence is in conflict. It is a question for the jury to determine. It is sufficient if the jury takes that view. Motion denied.

Mr. BUTLER.—Exception."

IV.

The Court erred in holding that plaintiffs had presented evidence sufficient to sustain their cause of action.

V.

The Court erred in not holding that plaintiffs' cause of action was barred by the statute of limitations. [25]

VI.

The Court erred in instructing the jury on the subject of representations claimed to have been made by defendant to plaintiffs, as follows:

"First, the plaintiffs must prove that the representations were made. That is to say that the defendant, to induce this bargain, represented to them that the land was well adapted to commercial orcharding, and worth more than $275 an acre. If plaintiffs prove either one of those representations it is enough to serve that branch of the case, and you proceed to the next step in the case. First, were the representations made? There is no question, Gentlemen of the Jury, that regardless of what Amblad may have said to the plaintiffs and they say he did represent it as adapted to commer-

cial orcharding, the defendant's book does make that representation. The defendant, being a corporation, it speaks by its agents, and its agents may speak orally or by advertising literature, such as this, which, of course, was prepared by some agent. So you find it in the book. No other reasonable interpretation can be placed upon it, and it was admitted in argument that the representation was made to the plaintiffs that the land was well adapted to commercial orcharding. No other reasonable construction can be made of it. It is not a question of how much truth is in the book, Gentlemen of the Jury, the question is whether that representation was made, and whether, as I will subsequently state to you, it was false. [26]

In respect to the allegation that the representation was made, made to plaintiffs that the land was worth more than $275 an acre, both the plaintiffs testify that Amblad did represent that to them. And the brother of the plaintiffs, who was there, testified to the same thing; and Amblad says nothing about that when he testifies. So there are the two plaintiffs and their witness testifying that the representation was made, and no evidence in denial on the part of the witness Amblad, who represented the defendant in that transaction."

VII.

The Court erred in instructing the jury on the question of the falsity of the representations.

VIII.

The Court erred in instructing the jury on the

question of defendant's knowledge of the falsity of the alleged representations, as follows:

"If you find by the greater weight of the evidence that the land is proven to have been worth less than $275 an acre at that time, you proceed to the next step, and that is, that the defendant is not liable in any way unless they know those representations, or either of them were false, or unless the defendant ought to have known it, or unless the defendant made the representations in a positive fashion which presumes knowledge, and which it cannot now deny. Did it know if the land was not adapted to commercial orcharding successfully? Did the defendant know it? It had been handling these lands at that time some eight or nine years. I think the book [27] says it sold the first tract out there in this project in 1921. It had experts, horticultur*al*ists—undoubtedly a man is pretty well presumed to know what he owns in respect to its adaptability to any purpose, especially if he has experts in that particular purpose.

Furthermore, if it did not know it, should it not have known it during all these years that it had it, and selling it out in the market to people on these representations that it was valuable for fruit as a commercial enterprise?

Moreover, it states in this book that it is proven beyond a doubt. Nothing stronger can be said than that, Gentlemen, that it is proven beyond a doubt that this land is adapted to commercial orcharding.

When they made that representation, Gentlemen of the Jury, the law implies they knew whether it

was true or false. If it was false they are bound by it, and would be liable accordingly.

And so in respect to value. If it was not worth $275 an acre, did defendant know it, taking into consideration all their experience with the land? If you find that the defendant did know that the land was not adapted to commercial orcharding, or ought to have known it, or positively asserted, as it did, that it was, the law presumes knowledge, and the plaintiffs' case is so far made, and you proceed to the next step."

IX.

The Court erred in instructing the jury on the question of plaintiff's belief in the alleged representations and their reliance thereon, as follows: [28]

"Then the next step. The law is that unless the plaintiffs believed the representations and did rely upon them, in whole or in part, to some extent, at least, then there is no liability, because if the plaintiffs did not believe them, if they did not influence the plaintiffs to buy the land, they have not been harmed by them, they are simply out of the case, they are superfluous. Did the plaintiffs believe them? They say they did. They were Minnesotans; they knew nothing about California or California fruit, from the practical side, never having been here. All the knowledge they had they got from defendant's literature, and talking with their neighbors, so they say. They so testified. Remember, if your recollection is different from that of the Court, or if your recollection is dif-

ferent from that of counsel as they stated the testimony to you in their arguments, it is your recollection that controls in respect to the evidence.

They say that Amblad came to them after they had read the book first, and told them the same things that were in the book, and that they believed them. He finally told them on the 29th of September, If you don't buy before October 1st the land is going up in price. That appealed to their sense of thrift, and they did sign the contract that night.

It is not necessary that the plaintiff should have intended to start a commercial *office* (orchard). If the seller of land attaches to it an attribute of value and the buyer appreciates it gives a value to the land, whether in the present or in the future, if he did want to sell it again, and he is to some extent influenced by [29] that assigned attribute, that is enough to entitle him to recover, if it is false.

So here, even if the plaintiff had not intended to go into commercial orcharding when it was represented to them that this land was adapted to commercial orcharding, if they appreciated that as something that gave additional value to the land, and they bought it because of it, the mere fact that they did not intend to go into commercial orcharding right away, or at all, is immaterial. But they tell you that they did intend to go into commercial orcharding eventually. They say they followed the plan of the book, which says that there is a long period after planting before the orchard

is in bearing; they must have an income in the meantime, they must go into the chicken business. They tell you that Amblad told them that. Amblad says, however, that he did not tell them anything about commercial orcharding, although he talked about fruit, and that they were only talking chickens. After they got here the plaintiffs followed the book, they went into chickens, and after due course of time they began to grow trees, to test out the land to see what it would do in the way of fruit.

So if you find by the greater weight of the evidence that the plaintiffs believed those representations, and to some extent relied upon them, in whole or in part, and were thereby induced or influenced to some extent to buy by reason of it, the plaintiffs' case is made out thus far. Ask yourselves, What does California stand for in the east, what its trademark is other than climate and fruit. I want to say right here, Gentlemen of the Jury, [30] that the law presumes that all transactions are fair and honest until that presumption is overcome by the evidence in the case. But the resources of California and the State are great enough that they need no false representations to sell them abroad. It is not good for the State. I am not saying there were any. That is left for you. You must not get the idea into your head that just because you are Californians you must uphold the credit of the State and the value of its lands by thinking that that was ordinary puffing for the selling of land, if they were false. If they went beyond that and made false statements, they had no right

to do it. You cannot induce any man to enter into a bargain by false statements and escape liability."

X.

The Court erred in instructing the jury on the question of the measure of damages, as follows:

"Now, the next step. If you find that the plaintiffs were influenced to enter into the bargain, the next question is, Were they damaged? If they were not damaged they are not entitled to recover. And that brings you right back again to the question of the value of the land. If you find the land was worth less than $275 an acre, they are entitled to the difference. If the plaintiff paid $275 per acre for this land and it was not worth that, they are entitled to be made whole in that respect. If you find, and this is simply by way of illustration, that the land was only worth at that time $100 an acre, the plaintiffs should recover the difference between $100 and $200 an acre, or [31] $175 an acre. If you believe it was worth $200 an acre in 1921, plaintiffs would be entitled to recover $75 an acre, and so on. Then there are other damages. The plaintiffs say that after the recommendation was made to them that the land was well adapted to commercial orcharding, they started to try it out with fruit-trees, and they planted some and they died. They did not flourish. Therein they say they spent some hundreds of dollars—$200 for the trees, and to blast the ground and plant them. Cultivation $50. Then they say they spent a certain amount of money for an additional well and a certain plant that otherwise they would not have

spent except for the trees. Well, Gentlemen, I rather think that that might take rank, so far as the well and the pump are concerned, of a permanent improvement for whatever purpose they will see fit to adapt the land to, and I think no damages should be allowed for that. In other words, those matters have not been proven with sufficient definiteness. They admit the plant has some value. It is hardly possible to make out any damage there with any reasonable certainty. So I think you will limit yourselves to the damages on the score of the trees, if you give any damages at all, and to that of the cultivation, and for the blasting of the trees, in such reasonable amount as you may find, not exceeding $250, as you believe plaintiffs to be entitled to, that they have proved that they spent."

XI.

The Court erred in instructing the jury on the question of the discovery of the alleged fraud, as follows: [32]

"But that is not quite all the case, Gentlemen of the Jury. The plaintiffs purchased this land away back in 1921. If they were deceived by false representations, if false representations were made, they were deceived at that time. The law is that they must begin their suit to recover within three years after they discovered the fact that they have been deceived. This deception is secrecy, and plaintiffs are not bound to bring suit until they discover it, and within three years thereafter. The suit was begun on February 6, 1928; so the three years within which they could begin the suit began

on February 6, 1925. Unless you find from the greater weight of the evidence that they did not discover the fact that they were deceived before February 6, 1925, they are not entitled to recover in any event. The statute of limitations would run against them. That is the policy of the law, Gentlemen, and in proper cases it must be enforced. They say they did not discover the fact. They say they came here in 1922, and did some building, wherein they discovered some hard-pan down at eighteen inches, but that that did not mean anything to them. If it excited any suspicion, the plaintiff said he went to Mr. McNaughton, the company's horticultur*al*ist, and McNaughton told him that was not harmful, that all you have to do is to blast that, and that it is really very good for the fruit-trees when blasted, it has lime in it, etc., and is in the nature of fertilizer. I think Mrs. Lindquist testified to the same thing, but I don't remember about that. Anyway, that is what the plaintiff Lindquist says [33] McNaughton told him. Well, remembering, Gentlemen of the Jury, that the plaintiff knew nothing about fruit, and knew nothing about land, and what was essential to successful orcharding, and if he believes the representations in the first place, were they not allayed and quieted, if he had any suspicions, by Mr. McNaughton, the company's horticultur*al*ist—by what he said to him? There is no denial that McNaughton said that. The law in respect to that is that the party who has been deceived, must pursue the inquiry with such diligence as a prudent man,

in the circumstances, would, when he discovered it is the time when the statute begins to run. He is not required to employ experts in order to discover that. It seems here to be a matter of expert knowledge, or experience, to determine whether land is adapted to successful orcharding. You have heard the experts differ on it; you have heard men of experience differ on it. The plaintiff came here without experience. He is not obliged to employ an expert to tell him about it. If, believing the representations in the first place, and he then relied on the further representations allaying his suspicions, he is not bound by the limit of time until he makes the actual discovery. They planted trees in 1924 and 1926; they died after a year or two; they say that for the first couple of years they did fairly well, but that finally they died. Mrs. Lindquist says she went to see Mr. Schei when some of the trees died. Schei was one of the representatives of the company here. He said, so Mrs. Lindquist testifies, "That is nothing; this is sour sap here; a tree is liable to die any place on occasions." She testifies that Schei said, "they died once in a while anywhere; this is the year of sour sap, and that sour sap caused it." That was in 1926. There is no evidence, that I remember, [34] that there was any sour sap in 1926, and she says that is what Schei told her. Anyhow, that was after the time when they would be barred. So that may be dismissed from your mind. If you do not find from the greater weight of the evidence that the plaintiff had knowledge before February 6,

1925, or had notice of such facts that with reasonable inquiry they should have had knowledge, then their suit is in time, and they are entitled to recover accordingly."

XII.

The Court erred in instructing the jury on the statute of limitations as requested in defendant's proposed instruction No. 1, reading:

"You are instructed that in an action for relief on the ground of fraud, such as this case, the plaintiffs must show that the fraud occurred within three years of the commencement of their action for relief, or if their action was commenced more than three years after the fraud occurred, then they must show, in order to maintain their suit, that they did not discover they had been defrauded until a date within three years of the time they commenced their action.

With regard to this discovery of the facts constituting the alleged fraud, you are instructed that the plaintiffs will be presumed to have known whatever with reasonable diligence they might have ascertained concerning the fraud of which they complain.

You are instructed that the evidence shows that the alleged fraud was committed more than three years prior to the filing of the action, and your verdict must be in favor of the defendant, unless the plaintiffs have proven by a preponderance of the evidence both that they did not discover the alleged fraud within the period of three years before they filed their action, and that they could not have dis-

covered it by the exercise of reasonable [35] diligence, three years before they commenced this suit. They were not permitted to remain inactive aftr the transaction was completed, but it was their duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to them. They are not excused from the making of such discovery even if the plaintiffs in such action remain silent. A claim by the plaintiffs of ignorance at one time of the alleged fraud, and of knowledge at a time within three years of the commencement of their action, is not sufficient, a party seeking to avoid the bar of the statute of limitations in a suit upon fraud must show by a preponderance of the evidence not only that he was ignorant of the fraud up to a date within three years of the commencement of his action, but also that he had used due diligence to detect the fraud after it occurred and could not do so. If fraud occurred in this case it was complete when plaintiffs contracted with the defendant to buy land. Plaintiffs commenced their action on the 28th day of February, 1928; their contract with the defendant for the purchase of its land was made in September, 1921. If you believe from a preponderance of the evidence that the defendant committed a fraud upon plaintiffs in the making of this contract, then before you can find a verdict in their favor, you must also believe from a preponderance of the evidence that they neither knew of the fraud, nor could with reasonable diligence, have discovered the fraud before a date three years prior to the

commencement of their action, that is, before the 6th day of February, 1925. If you believe from a preponderance of the evidence that plaintiffs either knew of the facts constituting the alleged fraud before February 28th, 1925, or by reasonable diligence and inquiry could have learned these facts before that date, your verdict must be for the defendant." [36]

XIII.

The Court erred in refusing to instruct the jury concerning the effect of the discovery by plaintiffs of the falsity of a material representation as requested in defendant's proposed instruction No. 2, reading as follows:

"DEFENDANT'S INSTRUCTION No. 2.

You are further instructed upon the matter of plaintiffs' discovery of the alleged fraud that if plaintiffs discovered that a material representation concerning the land they bought was false, then they were at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring their action within three years of the discovery of the falsity of any material representation concerning the land.

XIV.

The Court erred in refusing to instruct the jury concerning the distinction between representations of fact and of opinion, as requested in defendant's proposed instruction No. 4, which reads as follows:

"DEFENDANT'S INSTRUCTION No. 4.

You are instructed that a representation which merely amounts to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit, though it may not be true, for a party is not justified in placing reliance upon such statement or representation."

XV.

The Court erred in refusing to instruct the jury concerning the effect of plaintiffs having been able by reasonable diligence to discover the alleged falsity of representations as to [37] value, as requested in defendant's proposed instruction No. 5, reading as follows:

"DEFENDANT'S INSTRUCTION No. 5.

You are instructed that if the plaintiffs discovered, or by the exercise of reasonable diligence could have discovered, the falsity of the alleged representations as to value of the land they bought more than three years before they commenced their action, then your verdict must be for the defendant."

XVI.

The Court erred in instructing the jury that defendant, by its book, represented plaintiffs land to be well adapted to the growing of deciduous fruits commercially, and also that the statements in de-

fendant's literature applied to the land purchased by the plaintiffs.

To all of which the defendant duly excepted.

WHEREFORE, defendant prays that said judgment be reversed and held for naught, and that defendant be restored to all which it has lost by reason of said verdict and judgment.

J. W. S. BUTLER,
Of the Firm of
BUTLER, VAN DYKE & DESMOND.
EDWARD P. KELLY.
EDWARD P. KELLY.

Service hereof is hereby admitted and receipt of copy acknowledged this 26th day of November, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Nov. 26, 1928. [38]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That on the 16th day of October, 1928, the above-entitled cause came regularly on for trial before Hon. George M. Bourquin, Judge of said District Court, and a jury impaneled and sworn to try said cause and the issues presented by the complaint of the plaintiffs and the answer of defendant, plaintiffs appearing by their attorneys, George E. McCutchen and Ralph H.

(Testimony of H. A. Lindquist.)

Lewis, and the defendant by its attorneys, J. W. S. Butler and Edward T. Kelly; and thereupon the proceedings taken, the evidence given, the objections made, the rulings thereon and the exceptions thereto were as follows:

TESTIMONY OF H. A. LINDQUIST, FOR PLAINTIFFS.

H. A. LINDQUIST, one of the plaintiffs, a witness on his own behalf, testified:

I am one of the plaintiffs here. In 1921 I was living in St. Paul, Minnesota. My occupation back there was cabinet-maker. I had never been to California, and did not know anything about [39] California fruit lands. I knew nothing about the value of California lands.

I got one of these books. I do not remember any pencil markings on it when I got it.

Mr. McCUTCHEN.—We offer this book in evidence, solely for the purpose of showing the representations made to these plaintiffs. We do not contend there were any pencil markings in the book when the plaintiff got it.

Mr. KELLY.—The offer is objected to on the ground that if it is offered for any purpose, the whole book is necessary in order that the representations for which the offer is made may be correctly interpreted and construed, and unless the book is offered as a whole we object to it for that reason.

The COURT.—Objection overruled.

Mr. KELLY.—Exception.

(Testimony of H. A. Lindquist.)

(The book was received in evidence as Plaintiffs' Exhibit 1.)

WITNESS.—I got that book from Mr. Amblad in my home in the latter part of September, 1921. I did not send for Mr. Amblad. I talked to the neighbors around there who bought already. Mrs. Anderson told Mr. Amblad about it, so he got hold of it and came over to my home in the evening, about six o'clock. My brother and sister-in-law and my wife and Mrs. Anderson were there. He told me about these lands that he was selling out here, and the kind of people they were selling to. He said Mr. Bean was the owner of the land, and he wanted nice clean people and he was very particular about that, so he thought we were all right. He said he had a very fine piece of land to sell for thirty-two hundred fifty dollars that [40] would just suit me, ten acres. He said it was worth more, because the land was going up on October 1st. He said it was good for all kinds of fruit for commercial use. He talked about the chicken business, too. He told me the best way to get started out here to get independent was to start with seven hundred pullets and when you get an income from the pullets you can, in the meantime, plant the land, and in that way you can be independent in two or three or four years. I read the book the whole evening and he talked about the same that is in the book. I believed those things he told me about fruit raising, and the things I read about fruit

(Testimony of H. A. Lindquist.)

raising in the book. I signed a contract that evening. I recognize my signature.

(The contract, dated September 29, 1921, between the plaintiffs and defendant, was received in evidence as Plaintiffs' Exhibit 2.)

The things they told me from the book and orally about the fruit land and the value of the land had an influence on me when I signed the contract. I believed all that the book said, and so I talked it over with my wife and I thought it was a fine proposition. What Mr. Amblad said had an influence on me in signing that contract. He was a smooth talker.

I came to California in February, 1922, and moved on that land right away, and put up a house there. I first found hard-pan when I started to dig in the ground. It was in the same spring, but I cannot exactly tell the date.

Q. Did you just go down to the top of the hard pan, or did you go into it a way?

A. I struck the hard-pan and I was stuck there; some places it was a little deeper. [41]

WITNESS.—Over the hard-pan the soil is of an average of about eighteen inches deep. I did not go to the company when I saw the hard-pan to see if it was going to interfere with fruit raising. I waited till Mr. McNaughton, the agriculturist for the land company, came around. I asked him about the hard-pan, and he said that is something very good for the fruit when it gets blasted, so I was satisfied with that. He said, "You blast it first

(Testimony of H. A. Lindquist.)

and when the tree don't do so good you can blast to the side and that contains a whole lot of lime and potash," and all that stuff. I didn't understand it.

I did not find out how thick the hard-pan was until I dug the well pit in the fall of 1926. The hard-pan went down sixteen feet. It was probably a little softer in the bottom at sixteen feet, and all the way down it was hard. We had to blast it.

I planted eight trees on the land in 1924 and in 1925 I planted seventy. I hired cultivation for the trees and cared for them. I watered them about every two weeks. Thirty-five died in 1927. There are now thirty-six living and fifty-two of all my trees are dead. I don't think that was because of any lack of care. I sent my wife to Mr. Schei, and she talked to him.

When I dug the pit I spread some of the hard-pan on the lawn, because I thought it was good stuff. I mashed it up and left some lumps on top. They have broken up.

The blasting and the planting of the trees cost me two hundred dollars, and it cost me about fifty dollars to cultivate them.

I put in a small pump at first, which was sufficient for the chicken raising and my home. When I decided to go into fruit I put in a larger pump in 1926 and an irrigation system. The pump [42] was a Superior Pump with a three horse power motor, and for an irrigation system I bought twenty-two hundred feet of pipe. That was for

(Testimony of H. A. Lindquist.)

irrigating the orchard. The pipe cost about two hundred dollars. I put in a pressure system that cost five hundred seventy-five dollars in all, which included the cost of the well pit, which was thirty dollars, so that would leave four hundred ninety-five dollars, and that includes the pump and the pressure system. My old pump I could use for my chicken business and my house. I paid one hundred eighty-two dollars for the old pump and sold it for fifty dollars. I think the new one is now worth about two hundred dollars.

Cross-examination.

I am forty-six years old. I came from Sweden in 1911. I first heard about the Rio Linda lands when my neighbors spoke about it. They bought land here and they were talking about it, and I saw a book from the land company that I read in my neighbor's house. That was about the same month I bought. Mrs. Anderson was my neighbor. I know Mr. Peterson, but we never talked about it. I know that he bought land. I know Mr. Carlson, and I know that he bought land. Before I bought my land I talked with Mrs. Anderson, but not with Mr. Anderson.

I did not get a book from Mrs. Anderson; I read it in her home.

Mr. Peterson, Mr. Anderson, Mr. Carlson and myself worked in the Railroad Shops in St. Paul, but in different departments. We never saw each other. We were all in the same kind of work and had been for a long time.

(Testimony of H. A. Lindquist.)

I talked with Mr. Peterson about the Rio Linda property after I bought, not before. I knew that he bought out here, but I [43] never talked with him. Before I bought I knew that Mr. Peterson had been out to the Rio Linda country.

I read this book the same evening I put in my name. That was the second time I read it. I first read it at my neighbor's, but did not read it so particularly. The night I bought I read the book nearly all through. Mr. Amblad was at my house that night for three and a half or four hours. He got there about six o'clock and left about half-past ten or eleven. During all that time my wife and my brother and his wife were there, and we were all talking about the Rio Linda country. It is a fact that the only reason I signed that contract that night was because of what I read in the book and what Amblad told me. That was the only thing that influenced me. I was interested in California before I saw Mr. Amblad, but not so long. I became interested when I read the book the first time, and when Mrs. Anderson talked to me about that country. She did not tell me it was a fruit land country. She never said anything about that. She told me it was a poultry country. Mr. Amblad told me it was a poultry country, and the book told me that it was a poultry country and a fruit country. The book told me that. I intended to go into the poultry business in California and fruit, the poultry business first to get a start. My health was not very good there. I had stomach trouble

(Testimony of H. A. Lindquist.)

and had been doctoring for a long time before this. My doctor had told me that I ought to get away from that climate in Minnesota. He didn't tell me that I should move to California for a warmer climate. I did not tell Amblad I had to go to California because my doctor told me I had to get into a warmer climate. I did not tell Mr. Peterson anything of that kind. Neither Mr. or Mrs. Peterson were present when Amblad was talking to me. [44]

It was four months after I signed my contract until I went out to California. Before I signed my contract I had learned what Peterson and Anderson paid for their land. I think Anderson paid two hundred seventy-five, and I don't know exactly how much Peterson paid. I did not know in a general way what the land in Rio Linda was selling for before Amblad came to my place that night, but I did know what Anderson paid. In four months I went to California and took my wife and stayed, and this was the first time that I saw my land. There were some improvements on the land at that time, a small chicken-coop and a well, which was supposed to be one hundred forty-seven feet deep. It was cemented up. I could not examine the soil of that well at that time. It was only a ten inch hole.

Q. What did you do about looking over your land and looking at the soil?

A. Well, I don't understand much about it. I was satisfied with it.

(Testimony of H. A. Lindquist.)

Q. Then you mean you didn't do anything, is that right? A. I built up a little house.

WITNESS.—I did not talk with any of my neighbors there about the soil nor about the land. I saw fruit orchards in another district there, but not where my lot was.

Q. What are the people doing in that district; what is their business?

A. It was all a new settlement there and I was the first one in the whole square.

Q. You were the first one to settle there?

A. Yes. [45]

Q. In the next district out around there, what was the general business in Rio Linda?

A. Well, they had chickens, to start with, just like I was trying to do.

Q. Well, the principal thing, Mr. Lindquist, and then we will pass on, was—

The COURT.—Just a moment, just a moment. Let him answer. Don't run over him.

Mr. KELLY.—Q. What was the business you saw there in the Rio Linda district?

A. I didn't see any business, at all, except chicken-coops.

WITNESS.—I first planted eight fruit-trees in 1924, and in 1925 I planted seventy, and I planted again in 1926 when I replanted ten that died. I did the planting myself. I did not take care of those trees. I hired that done. Three or four different people did it for me—Mr. Johnson, a neighbor, Mr. Thom and Mr. Grunhoffer.

(Testimony of H. A. Lindquist.)

After I got to Rio Linda I got a job in the Southern Pacific shops as a cabinet-maker. That is the same place where Mr. Peterson and Mr. Anderson went to work later on. We are still working there in the railroad shops.

I improved this farm. I had to make my living. I worked as much as I could over there. This photograph is a fair picture of my place.

(The photograph was offered in evidence as Defendant's Exhibit 5.)

Redirect Examination.

I did not find out before 1927 that that land was not fruit land, nor that it was not worth two hundred seventy-five [46] dollars an acre. Before 1927 nobody told me that that was not fruit land there, nor that it was not worth two hundred seventy-five dollars an acre. When Mr. Davis was out there we dug hard-pan up together.

TESTIMONY OF SELMA A. LINDQUIST, FOR PLAINTIFFS.

SELMA A. LINDQUIST, plaintiff, testified as follows:

I am the wife of Mr. Lindquist, who was just on the witness-stand. In 1921 we were living in Minnesota. I had never been to California. I knew nothing about California fruit lands or their value. I was present when Mr. Amblad came to our house in September, 1921. He had a map and a book that he showed us, and he said he had ten acres of fruit

(Testimony of Selma A. Lindquist.)

land for sale and he wanted us to buy. We talked it over. He showed us the book. We all read it that evening. He said that the price was now two hundred seventy-five dollars; that it was worth more than that, but they were selling it at that before October 1st, and then the price was going to be raised, and on January 1st it was going to be raised another hundred dollars. The land was going very fast. We signed the contract that evening. He said he would have to see Mr. Bean about it before he could sign. He said Mr. Bean always wants to meet the people that go out there to see if they are all right. He thought Mr. Bean would let us come here, and if we couldn't go out, we could just tear this contract up. He said Mr. Bean was a rich man who had this Haggin Grant Ranch for sale. He said he was selling it to nice working people, giving them a start in life.

He said we should plant a family orchard, some trees of each kind, and the rest we should plant in a commercial orchard, all of one kind. He said it was good land, rich and fertile and it was real fruit land. [47]

I signed this contract with my signature at the bottom, and in signing it I believed the things that Mr. Amblad told me and what I had read in the book. They influenced me to sign it. Then we came out here in 1922, and moved on the land. We did not plant our trees until 1924. We did not get the power out there. We were supposed to have it, but we did not get it before 1925. The first year

(Testimony of Selma A. Lindquist.)

the trees were doing good. We planted eight trees in 1924 and then we planted seventy trees the year after. Some of them died, and my husband planted ten more, and now fifty-two of them have died. When the trees died in 1927 I went to see Mr. Schei, who is the resident secretary of the Sacramento Suburban Fruit Lands Company. I told him the trees were dying, and it looked like we cannot even get a family orchard out there to grow. He said it was sour sap. He didn't say much about it. He said a tree will die once in a while. I said, "It looks to me we cannot get even a family orchard. Won't you take five acres back? He said, "No, the company cannot do any such thing, because they have too much land to sell themselves." About the trees dying, he said trees were dying all around from sour sap.

Q. Did you believe from what he told you that your land was still adapted to fruit raising?

A. Well, we didn't know. We had just put in the pumping plant then. That was in 1927, and we had between two and a half tons of pipe, and we planned to go ahead and get the land ready and plant it and get an income.

WITNESS.—The pipe is still laying there. I don't think we could get much out of it. [48]

I did not find out before 1927 that that land was not adapted to raising fruit. Nobody ever told us it was not. Mr. McNaughton told us that if we blasted it was all right. We believed what Mr. McNaughton said. We never heard from anybody

(Testimony of Selma A. Lindquist.)

that it was not worth two hundred seventy-five dollars an acre. People thought we did not pay much. The others paid more.

Cross-examination.

We first met Mr. Amblad in our house in St. Paul, Minnesota, in September, 1921. That was the night he came over there and sold us the land. I had never met Mr. Amblad before. Mrs. Anderson introduced me to Mr. Amblad right there. She was with him at our house that night. I did not meet him the day before. The contract that my husband and I made, that was all done at the same time that my brother-in-law and his wife signed a contract. He came over to our house. They also had a little money and they thought it was nice to come out here and have the land.

We had talked about going to California before. We read the book with some of the neighbors, and we thought it would be better than what we had then. I talked with Mrs. Anderson and Mrs. Peterson, not much with Mrs. Peterson. They had never been in California. Mrs. Anderson did not come for three years afterwards. I knew Mr. Peterson had been to California but I did not talk with him.

I did not know what the price of that land was before I saw Mr. Amblad. He told us it was going to go up. Before I saw Mr. Amblad Mrs. Anderson told me that we would have to pay two hundred seventy-five dollars an acre. It did not take very long for Mr. Amblad and us to make this deal; it

(Testimony of Selma A. Lindquist.)

was three or four hours, [49] because it would soon be October 1st and it was going to go up to three hundred dollars, and that would make a lot of difference.

We went out to California in February. We did not hear anybody say at that time that we had paid too much for the land. It had already gone up to four hundred dollars. There was no sign around there advertising land for less money. There were not many families. I don't think there were more than eighty families around there then.

Q. But from real estate dealers; did they not have signs around on the highway and on the roads advertising land?

A. When we came out there it was wet. The Land Company took us out there and we were not around much because it was so wet.

WITNESS.—I have lived on the place all the time, and my husband has been working in the railroad shop, together with Mr. Peterson and these other people, not in the same department, but in the same shop. We hired care for the place and the trees, and I did a lot myself.

We went into the poultry business. The most we had was nine hundred chickens. We have a hundred seventy-five now. We had nine hundred chickens a couple of years after we came here. First we had four hundred fifty, and we added to them. We went into the poultry business as soon as we went on the place; we were to make our money that way to plant our trees.

(Testimony of Selma A. Lindquist.)

Q. Your other neighbors around there, what business were they in at that time?

A. There were no people there. They were to start out with chickens and make a living on chickens, and then plant when they got the land ready. [50]

Q. And you took care of the chicken business yourself? A. Yes.

TESTIMONY OF JOHN LINDQUIST, FOR PLAINTIFFS.

JOHN LINDQUIST, a witness for plaintiffs, testified:

I am a brother of Mr. H. A. Lindquist, and was at his home when there was a conversation with Mr. Amblad on September 29, 1921. The conversation took some hours. During that time Mr. Amblad said with reference to the value of these lands that he had land to sell for two hundred seventy-five dollars an acre, but that it was really worth more than that, and it was going to go up on the first of October.

Cross-examination.

That night was the first time I saw Mr. Amblad. I had read the book before and I had heard about it, but I never decided to go out before that night. I work with my brother in the shop. Peterson and Anderson and Carlson work there also, but in different departments. Those men all bought land in the Rio Linda district before I did. Mrs. Peter-

(Testimony of John Lindquist.)

son, I think, had been out there and looked at the country. I had not intended to go to California before I bought this land. My health was pretty good.

TESTIMONY OF HOWARD D. KERR, FOR PLAINTIFFS.

HOWARD D. KERR, a witness for plaintiffs, testified:

I am a real estate broker and have been in the real estate business for twenty-two years in Sacramento County. My office is in the Nicolaus Building. I have had experience dealing in country lands in this county practically all of the time. [51]

I am familiar with the Rio Linda district, and particularly with that section known as Vineland. I appraised the lands of H. A. Lindquist, described as Lot Number Nineteen of Vineland, as of the 29th day of September, 1921. At that time the value of the land was seventy-five dollars an acre.

Cross-examination.

I have been in the real estate business twenty-two years right here in Sacramento. I first saw this tract yesterday. I was there about twenty minutes. I walked all over it. I looked at the soil in a general way from the surface. I did not make any borings. I don't know how deep the soil is in any part of it.

I noted the improvements on the land. The

(Testimony of Howard D. Kerr.)

gravelled highway is right there, running east and west.

It is located in a district where the industry is mostly poultry. I am not familiar with the workings of the Association in the poultry district.

In fixing my value of that land I took into consideration an industrious and thriving industry. I did not take into consideration the possibility of fruit production, and I say that the value of the land at that time was seventy-five dollars an acre. I did not take into account the possibility of fruit raising, because I don't believe it can be done successfully. I don't think it is general in that location.

When I looked at that land I looked at it with the idea that it was not in a fruit-raising district, but from the standpoint of a man wanting to live out there and wanting to raise chickens. It had two or three acres of rather low land, but that is a benefit to the high land, so that it gives it the proper drainage. I took into consideration the roads and what other land could be purchased [52] for with similar soil and conditions.

I never bought or *soil* any land in the Rio Linda district. I know of a lot of it being sold in 1921, no particular place, but just generally. I don't know of any land having been sold in that district as low as seventy-five dollars an acre. I do not know what lands were being sold for there at that time, in 1921.

(Testimony of Howard D. Kerr.)

Q. Don't you take into consideration in fixing the value of that land back there in 1921 what other lands were selling for out there?

A. Not specially, no. Many lands are sold in subdivisions at a very high price, due to the attractive terms that can be given, or due to some exchange that is being made where they get that value by making a deal on the other property.

Q. As a real estate man, fixing the value of property, don't you take into consideration what other people are paying for land of the same kind and character in that vicinity?

A. Not necessarily in that same vicinity. Other locations are taken into consideration.

Q. That has nothing to do toward fixing the value of that land? A. No, sir.

WITNESS.—I am acquainted with the Del Paso Heights district. I think it is about five miles north of Sacramento. We generally figure from the subway out here. I would say it is about five miles from the land of Mr. Lindquist, which is further to the north than Del Paso.

I acted as an appraiser of the land in the Del Paso Heights district in a suit involving the Great Western Power Company—I don't remember when that was, and as such appraiser I afterwards [53] gave testimony in the action of the Great Western Power Company *versus* T. Wah Hing.

Q. Were you asked this question, and did you give this answer in that case:

(Testimony of Howard D. Kerr.)

"Q. Are you familiar with the lots over which the plaintiff in this case seeks to build a power line? A. Yes, sir.

Q. Known as Lot 11, Block 22, 26 and 27, of East Del Paso Heights. What, in your opinion, Mr. Kerr, would be the reasonable market value, if sold for cash, of the lots cut up there during the month of January, 1927, if given a reasonable time to find a purchaser?

A. About $200 per lot on the south side, between that and $250 on the north side."

Were you asked that question, and did you give that answer? A. I did.

Q. How large an area is the lot you were speaking about in that testimony?

A. I don't remember at this time. I knew at that time, but I don't remember now.

Q. Can you give us an estimate, taking an acre as a basis, how many of those lots in an acre?

A. I don't know whether they were quarter acres, or not. I believe that further down we gave the size, I am not sure.

Q. I don't care exactly about that, Mr. Kerr. How many lots in an acre?

A. That would depend largely on how the tract cut up as to roads, whether you measured to the center of the road, or not; they don't [54] usually measure to the center of the road, they measure from stake to stake, inside measurements.

Q. Now, coming back to the consideration you had in fixing the value, let me ask you this question

(Testimony of Howard D. Kerr.)

as a real estate man: Assuming that the land in the Rio Linda district, in the subdivision where Mr. Lindquist's lot is, assuming that that land is adapted to the successful growing of deciduous fruit, what, in your opinion, would that land be worth in September of 1921?

A. $75 an acre.

Q. It would have no greater value if it were adapted to the growing of fruit? A. No, sir.

Redirect Examination.

Mr. McCUTCHEN.—Q. In fixing the price on this Del Paso Heights property, was that as agricultural land, or city lots?

A. City lots.

Q. Counsel has directed your attention to whether you considered certain thriving business out in the Rio Linda district. Did you find any thriving business out there? A. I did not.

Q. Do you know anything about hard-pan conditions in Rio Linda? A. Just generally.

Q. Did that, in any way, influence your answer about assuming that it was fruit land?

A. Well, it is not fruit land.

TESTIMONY OF ADOLPH STERN, FOR PLAINTIFFS.

ADOLPH STERN, a witness for plaintiffs, testified:

I live in Rio Linda. I have lived there since 1922. In [55] 1923 I planted five hundred thirty

(Testimony of Adolph Stern.)

trees, five acres in Kadota figs, and in 1924 I planted my family orchard of twenty-seven trees. I had them cultivated. I watered them and cared for them generally. They done pretty fair the first two years, and after that they started to grow more uneven every year. Their present condition is small and stunted looking, except about eight or ten trees in one spot where there is deeper soil.

My soil averages from five or six inches to three and a half feet or four feet in depth in that one particular spot. I can tell the difference in the growth of the trees according to the depth of the soil. Where there is about a foot of soil the trees grew a foot and a half in these five years. The trees that are standing in four feet of soil are eight or ten feet high. I blasted fourteen holes for my trees. I am not able to tell any difference in the growth as between the blasted and the unblasted part. I have made an observation around the district generally. I am living out there and I was interested in Kadota figs, and I observed principally the Kadota fig orchards around there. I have observed ten or more people trying to raise Kadota figs. I have been around their orchards quite often. I have watched their orchards ever since I planted mine, because we had a kind of rivalry between ourselves as to who could grow the best trees.

Q. Can you tell us from your observation whether that hard-pan land with only a foot or two of soil deep on top of it is at all adapted to the raising of fruit-trees? A. No.

(Testimony of Adolph Stern.)

Cross-examination.

If I had four or possibly five feet of soil like I have on that small spot I would have nice trees. My judgment is that [56] it takes four or five feet at least to grow trees. The soil on my place is four feet deep, I think, in the deepest place, and the most shallow is possibly six inches.

I am well acquainted with that district. I am living there for six years, and am well acquainted with the different and varying depths of soil. The soil does not vary much out there, two or three inches or so. It is all about the same.

I know where Mr. Posehn's place is. I have seen his vines. He ain't got a commercial orchard. He has just a family orchard. I am acquainted with Mr. Hagel's place. I don't know what the depth of his soil is.

I am a plaintiff in a lawsuit of the same character as the one we are trying, and I have been contributing to a fund for the expense of maintaining this litigation.

Redirect Examination.

Q. Did you see any good fruit orchards on the Posehn or Hagel places?

A. There is a few nice trees. My family orchard looked just as good before 1927.

Q. Do you know how old those trees are?

A. I don't know exactly, but two or three years old, or four years old possibly.

(Testimony of Adolph Stern.)

Recross-examination.

My orchard looked just as good before 1927.

Q. In 1927 trees generally over the country died from sour sap, did they not?

A. Yes; out of twenty-seven I lost twenty-four. There were three left. [57]

Q. Have you seen the Posehn and the Hagel orchards since 1927? A. Yes.

Q. They look just the same, don't they?

A. I seen in Hagel's orchard some dead trees last week.

TESTIMONY OF H. L. FREDERICKSEN, FOR PLAINTIFFS.

H. L. FREDERICKSEN, a witness for plaintiffs, testified:

I used to live at Rio Linda. My general occupation is that of farmer. I have done farming pretty nearly all my life.

I tried to raise some trees in Rio Linda. In 1924 I planted sixty-seven or sixty-nine. I cared for, cultivated, watered and pruned those trees. The soil on which they were planted was from eight inches to twenty-four inches deep. They done pretty well the first year, then they commenced to die out. About half of them have died out, I guess. We cultivated them last spring, plowed and disced them, but they have not been watered. When we stopped working on them they looked fairly well. About thirty or thirty-five were dead.

(Testimony of H. L. Fredericksen.)

I made an effort to do general farming on that land. I sowed some wheat there and got about three sacks to the acre, and I sowed some barley. It didn't pay to work it.

Cross-examination.

My place is about a mile and a half from Mr. Lindquist's. It is all the same kind of land all through there. Generally over the whole district the land is about the same.

I don't know what is the chief industry in that district. I guess most of them have poultry to get something to live on. I am not in the poultry business. Part of the time I was. I went out of the poultry business about a year and a half ago, late in the fall of 1927. [58]

I am a plaintiff in a lawsuit of similar character to the one we are trying. I am also a contributor to a general fund for the maintenance of this kind of actions.

Redirect Examination.

My case was tried about a month ago.

TESTIMONY OF HERBERT C. DAVIS, FOR PLAINTIFFS.

HERBERT C. DAVIS, a witness for the plaintiffs, testified:

I am an agricultural specialist of the firm of Techow & Davis, Engineers and Chemists. My office is located at 621 "I" Street, Sacramento. I

(Testimony of Herbert C. Davis.)

have been there about three and a half years. During that time I have had a great deal of experience testing soils, making chemical analyses and borings and investigating land to determine what it is adapted to. I have had a great deal of experience along that line.

Before that I was manager of the United Orchards Company at Antelope for several years. Some of the property we had there adjoined Rio Linda Subdivision No. 6 on the northeast corner. We were orcharding there. While there I had occasion to test soils and make observations and comparisons between actual conditions and what I found by my tests. Prior to that time I had no practical experience to amount to much. I studied at the University of California prior to that time for about a year and a half and then more afterwards, making about three years work there altogether.

I examined the land of H. A. Lindquist, Lot Nineteen of Vineland. I made some borings there to determine the depth of soil. The figures on the map numbered one to twelve are numbers giving the borings. Under that are some dots; also dots with circles around them. The dot without the circle indicates a sounding made [59] with a steel rod to determine the depth to hard-pan. The dot with a circle indicates a boring. The figures in parentheses underneath the number of the borings are the depth to hard-pan in inches. The map shows the situation correctly. The cross section

(Testimony of Herbert C. Davis.)

clearly shows the situation. The strip of clay shown on the map is four or five inches thick. That is a gray adobe type of clay. The surface soil is the characteristic red sandy loam, San Joaquin type, and it is underlaid with this strata of gray clay. That is something I had not discovered in that district before.

(The chart was offered in evidence as Plaintiffs' Exhibit 4.)

I made an analysis of the samples taken there. In making our borings as shown on the map we took the series of three principal lines across the property and made one boring in each of those sections so as to give a fair accurate sample of the ten-acre tract. I tried to get a sample of the raw land as it would be without preparation, and avoided any place where it was obvious that fertilizer had been applied. We took the samples from the surface to the hard-pan and included the clay. The test we made was of a composite sample. I made a chemical analysis of that. We used one of the recognized methods. We treated the soil with a strong hydrochloric acid solution and took out the total acid soluble material in the soil.

Q. What is the result of that test?

A. Potash .10 per cent, equivalent to 4,000 pounds per acre-foot. Phosphoric acid, .055 per cent, equal to 2,200 pounds per acre-foot. Lime .186 per cent, equal to 7,440 pounds per acre-foot. Nitrogen .310 per cent, equal to 12,400 pounds per

(Testimony of Herbert C. Davis.)

acre-foot. Humus .35 per cent, equal to 14,000 pounds per acre-foot.

Q. I take it that the last three elements you mention are not [60] particularly important here: Is that true? A. No, they are not.

WITNESS.—The potash content is about one-third the amount we would expect to find in medium soil, or even a fairly poor soil.

Q. What about the phosphoric acid?

A. That is just about the limit of adequacy. If it were any less it would be entirely deficient. It is not the content we would find in a fertile soil.

WITNESS.—I have made a number of other tests in that district. This is the highest result of phosphoric acid that I have obtained so far, .055 per cent, equivalent to 2,200 pounds per acre-foot. The only way I can account for it is the nature of the soil.

There is a different situation in the clay stratum, showing there was a deposit of clay different from usual throughout the tract.

I made an examination of hard-pan on this place. I recognize that specimen shown me. It came from the west side of the tract, near the chicken-house. Mr. Lindquist and I dug that out. That is the surface hard-pan as it comes in contact with the soil. We dug into it I should judge about five or six inches. It was quite uniform for that depth. This reddish stuff went on for five or six inches.

I did not make any investigation in well pits to determine how thick the hard-pan was on that

(Testimony of Herbert C. Davis.)

tract, but I have on surrounding tracts. We have been in a good many of the well pits over that whole section. I found the hard-pan ranged from six to [61] forty-eight feet in thickness in so far as it is exposed. In general, the hard-pan is stratified to some extent. This material there occurs right at the surface, and is somewhat harder than the material found right underneath it. Generally it grades off into a white material of the same general character. It is simply a sandstone made up of finer grains than this material. It is somewhat softer mechanically, but from an agricultural standpoint it could be considered all the same thing.

From my investigations there I am able to tell whether this tract of land is at all adapted to raising any kind of fruit. It is not.

Depth of soil is the very first requirement in the commercial production of fruit, a minimum of about five feet of soil being usually considered necessary to permit the proper area for the feeder roots of the trees. They generally occupy the surface three feet of soil. The other roots of the tree go down into the lower strata, forming an anchorage and taking up moisture. Five feet of soil provides an area for the storage of moisture, and it also provides drainage, so that there is no excess water standing around the feeder roots of the tree.

In that particular type of soil it would not be practicable to blast and so provide drainage. The thickness of the hard-pan is too great. When hard-pan is of medium thickness, not to exceed two and

(Testimony of Herbert C. Davis.)

a half feet, and it is underlaid by soil or sand, then, blasting through the hard-pan you simply eliminate the hard-pan phase of it and make contact through that that provides drainage to the root area. On this land you would blast out a pot hole or basin in the hard-pan and of course it would be filled up with loose material, and the roots would penetrate down into that and during the winter storms it would hold an excess of water and you would [62] eventually drown out the tree. It would not be down deep enough to avoid the feeder roots of the trees. They would go down there.

Sour sap is confined almost exclusively to shallow lands, and to lands that are poorly drained and have clay substrata. It is due entirely to the standing of moisture around the roots of the tree.

Q. So that if a tree dies of sour sap it dies because its roots are covered with too much water; is that it?

A. During certain seasons of the year and changes in the temperature.

Q. How about the character of this top soil, as to its adaptability to raising fruit? Does the clay help any?

A. No, the clay would be a detriment. That would be one of the causes of sour sap.

Q. What about the rest of the surface soil. Would that be good for fruit raising?

A. What there is of it would be all right. Some fertilization would have to be practiced. It is deficient in potash, and just about the limit in phos-

(Testimony of Herbert C. Davis.)

phoric acid. Without fertilization and spending some money on it you would not get the vigorous growth to a tree that you would expect to get on fertile soil.

Cross-examination.

I am nearly thirty years old. I am not a graduate of the University of California. My schooling there covered altogether a period of about three years. Since then I have been in practical work and also some further educational work, but not to amount to much.

The figures I have given do not represent total content of [63] phosphoric acid. They are the total acid soluble content. They are not the total content of those two elements, because granite runs quite high in potash, as high as two or three per cent. I could make a total determination, but for agricultural purposes it would be perfectly obvious that it would mean nothing. At any rate, I did not do it.

In the analysis that I made I used what is called the strong acid soluble method. It was formerly a method used by the Association of Official Agricultural Chemists. Practically all of the authorities we have to refer to for comparison of results are based on that work. It is the strong acid soluble test. We have two acid soluble tests for soil, each one designed for a specific purpose. This one is designated as the strong acid. With this test on the sample, I had, I did not get the total content

(Testimony of Herbert C. Davis.)

of acid and potash. That was the test formerly used by the Association of Agricultural Chemists. That is a national organization. It is limited to chemists who are employed in state or Government or official work. The ordinary chemist is not a member. In so far as it affects work being governed by State or Federal law, the organization advises and sends out from time to time the more modern standard and tentative methods of analyses. The balance of it is simply a matter of guidance. The test I used was the one formerly used or recommended by this Association. I could not tell exactly when they abandoned it. It was some time ago. They have not adopted an official method since then. They simply have a tentative method, because there has been too much argument among chemists as to the purposes of soil analysis. I do not mean that chemists do not agree. The ordinary purpose of a soil analysis, so far as follow it in practice, is to recommend certain fertilizers that might be used. Enough has been made to determine how much of [64] that material is available to the plant, but we have not been able to agree on that, so we simply have to fall back to the amount that is probably available, and if there is soluble in strong acid, there is a chance that it might be available.

Q. What is the fusion test, Mr. Davis?

A. Taking a sample of soil and melting it at a high temperature, in conjunction with sodium carbonate, and other materials, so as to render abso-

(Testimony of Herbert C. Davis.)

lutely every atom of plant food or any other substance that you want to determine in the food soluble in either acid or water, so that the total amount can be extracted.

Q. And you are bound to have the total content in that test, are you not?

A. You are bound to have the total content in regard to that.

Q. With the same sample of soil, and with the fusion test, you and other chemists would get the same result of the content of the soil, would you not, from your analysis?

A. We certainly should.

WITNESS.—It is my opinion that five feet of soil is required for the successful growing of fruit. I have not found in my experiments and in my work orchards successfully growing on soil of less than five feet. I have found trees of various ages on soil under five feet, depending upon the type of fruit. I know of almond trees twenty-five or thirty years old on less than five feet, and I know of olive trees, peach trees and such trees as that. I have never found any of that great age.

The Antelope district is an almond district. I don't know how celebrated it is. We have big trees there and that soil is under five feet on an average. On the particular tract I operated [65] myself we had an average depth of about four feet of soil. We found that that is not enough soil to successfully grow almonds. Before I bought that tract of land I learned in school that it required at

(Testimony of Herbert C. Davis.)

least five feet of soil to successfully grow almonds, and that was true as to the successful growing of any deciduous fruits, and with that knowledge I invested my money in that tract, which I afterwards operated in that district, for a specific purpose.

Redirect Examination.

We were there seven years trying to raise fruit on this Antelope tract. The operation was very unsuccessful. We operated altogether about a hundred and fifty acres of land, and during that seven-year period we lost, I should say, about forty-seven thousand dollars. We were going at the thing on rather a large scale for certain reasons.

Q. You said there was no reason why there should be any variation between two chemists making a fusion test. Is the test you have given us, the strong acid soluble test, an exact method of analysis on which two people should not differ?

A. Why, certainly.

TESTIMONY OF LAMBERT HAGEL, FOR DEFENDANT.

LAMBERT HAGEL, a witness for defendant, testified:

I live in the Rio Linda district, where I own forty acres of land. I have owned it a little over five years. There are fifty-eight fruit-trees that I planted on part of the forty acres, which constitutes a family orchard, in a number of different

(Testimony of Lambert Hagel.)

varieties. I have thirty-six different varieties. [66]

The depth of soil where the family orchard is planted is on soil from six inches to twenty-four inches. There is hard-pan underneath that soil. I blasted for every one of the trees. I blasted in the fall, and planted the trees in the spring. One of the holes showed no drainage in the spring, and I blasted that again, and it is all right. Ever since that time I have had drainage in every hole.

In that blasted ground two nectarine trees are planted in twelve inches of soil, with trunks about six inches thick and about fifteen feet high, and good and wide. I had three lug boxes of nectarines to the tree, big in size and good in flavor. My cherry trees run all the way from two and a half to three and a half inches around the trunk, twelve to fifteen feet high, except one of the same age is smaller than the others. I had a heavy crop off those cherry trees. I had a heavy crop off my apple trees. All the rest was a light crop. What was on the trees was good fruit, but I cannot call it a heavy crop. The trees are only four years old and I only sprayed them once, and naturally last spring they did not bloom heavy enough.

My family orchard looks to be in very good condition. I have no dead trees there. I had three in 1927 when we had the general sour sap condition going through the country. I replanted those, which are doing well.

I have twenty-eight acres of vineyards, where the

(Testimony of Lambert Hagel.)

soil is from twenty-six to thirty-two inches deep. I did not plant the vines on blasted ground. The oldest of my vines are about three and a half years old. They are from cuttings. The vines have made a wonderful growth on that shallow hard-pan ground. That soil is apparently good for the growing of grape-vines and fruit-trees. [67] My vines are all in a healthy condition with good growth. I still have a crop on them. Last year they were two and a half years old and I took off between four and six tons from nine acres. This year I have sold five and a half tons so far, and there are about four and a half acres to pick yet. I am figuring on another four or five tons off them. They are young vines and have not reached their full bearing capacity. I did not prune them for a crop last spring.

I raise all the greens and vegetables out there that we need. They grow well on that ground. I consider that soil in its condition adapted to the raising of fruit and vines.

I am acquainted with the Stern property. I know Mr. Stern well. I pass that property quite frequently. I have seen his orchard many times. Mr. Stern's orchard was doing very good the first two years, but since the sour sap condition went through the country and these trials started he neglected it all the time. He plowed it in the spring and disced it, but as a rule out of time; that is, when the moisture is all gone. He did it too late. I cannot see that Mr. Stern is taking any care of

(Testimony of Lambert Hagel.)

his orchard since he has been interested in this litigation. It looks neglected.

This is a picture of a grape-vine on my property. That is in what I call the commercial vineyard.

(The pictures were offered in evidence as Defendant's Exhibit 6.)

Beside fruit growing and grape growing I am engaged in the poultry business. I have four hundred chickens. I have been only three years in the poultry business.

Cross-examination.

I moved on this place in 1923. The family orchard was [68] planted in 1924 and I have cared for it ever since. It has only fifty-eight trees. I planted part of the vineyard in 1924. From nine acres I sold four to six tons in 1927. I sold it to different persons that came to my place. I cannot name the persons. They were strangers to me. I did not weigh the grapes. We took the lug boxes. They weigh, as a rule, about forty-five or fifty pounds. In 1927 I had six or seven lug boxes of my own. These people always bring their own boxes, and I dump them into them.

There are no missing places in my orchard. There are no places where the trees have died. I never sold any fruit from my place, except the grapes.

I recall being present on the first Monday in December, 1927, at Mr. John V. Kral's place. At that time I told him to plant grapes on his place. I did not give him as a reason for it that it was useless

(Testimony of Lambert Hagel.)

for Mr. Kral to plant tree fruit on that shallow hard-pan land. I did not say anything of the kind. I did not, in substance, at that time and place say that shallow hard-pan land such as was in Rio Linda was not fit for tree fruit. I did not boast at that time that I had not bought of this company, and that the company had cheated all the people that bought from them.

Q. Do you recall being present at Mr. Kral's house in the month of November, 1927, when there were present Mr. and Mrs. Perra, Mr. and Mrs. Klein, and Mr. and Mrs. Kral, and did you not, at that time and place, in response to a question from Mrs. Perra, state that the Rio Linda land was too shallow for tree fruit raising?

A. I didn't say nothing of the kind.

Q. Did you not state, in substance, that fact?

A. No.

Q. Did you not state that it was foolish to plant tree fruit there and expect it to grow?

A. Nothing of the kind. [69]

TESTIMONY OF JOHN POSEHN, FOR DEFENDANT.

JOHN POSEHN, a witness for defendant, testified:

I live out in the Rio Linda district, where I have ten acres of land, and will have lived there five years on the 19th of November. My son Robert owns a place adjoining me on the west. He has five acres, and has lived there about the same time.

(Testimony of John Posehn.)

I planted forty fruit-trees on my place in a family orchard in a number of different varieties. Robert has some fruit-trees on his place in a family orchard. I planted it myself. The fruit-trees are planted on hard-pan lands. The soil is half a foot, a foot and two feet deep. I blasted for all my trees. The soil on Robert's place is about the same depth. He blasted for his trees. I find that in the blasted holes there is good drainage. The water goes through. My fruit-trees have made a very good growth. I have some trees I measured this morning. They are twelve feet high, sixteen feet wide, and about sixteen inches around above the ground. I measured a fig trees this morning, twenty inches around above the ground, twelve feet high, and there are lots of figs on it. A good crop of figs this year. Those trees were planted in 1924. We had all the fruit we need from the trees in our family orchard, and there is some on them yet.

I think that ground is all right for fruit when it is blasted. It grows fruit well.

I have four hundred grape-vines. I did not blast for my grape-vines. The soil is just about the same depth. The vines have made a very good growth. I had one Thompson Seedless, sixty pounds, and next to that forty-five pounds, and from one of the Malaga vines I got forty-one pounds. They are very sweet. The sugar content is twenty-two per cent. The vines bear well all through the vineyard. [70]

I have some grapes that I have brought in. That

(Testimony of John Poschn.)

is the Emperor Variety, without water. I have some I put water on. They are bigger, but not so sweet as these.

Q. Does that ground out there seem to you to be good for grapes?

A. I planted about six acres more this winter.

WITNESS.—My son Robert has some trees and vines on his place. They have made a good growth. He has some ornamental trees, just the same as around this building. There is one thirty feet high, and it is thirty inches round above the ground. I planted those trees myself in 1924. His ornamental trees and his fruit-trees have all made a good growth, and he had a good crop from his trees and also from his vines.

This is a picture of Robert's place. There is that tree right there that is thirty feet high and thirty inches above the ground.

This is a picture of my place and my vineyard.

(The pictures were offered in evidence as Defendant's Exhibit 7.)

Cross-examination.

A couple of my trees died in 1927. I blasted for those trees, and water gathered there. It was my fault. There was too much water from rain. I don't know if the water gathered in the potholes caused by blasting. It might be.

I dug a well pit on my place. The top soil there is two feet deep and underneath that two inches of hard-pan.

(Testimony of John Posehn.)

Q. And from there on there was twelve feet of hard-pan, wasn't there? [71]

A. No, that is not hard-pan.

Q. But it is just as hard as hard-pan, isn't it?

A. Oh, no, you can pick it.

Q. But you didn't pick it, did you?

A. When you want to make headway you have to use dynamite to hurry up.

Q. In order to get it so that you could make any headway at all you had to use dynamite, did you?

A. Yes.

Q. And you used dynamite all the way down, did you? A. Yes.

Q. This well pit of yours, you did not have to cement that pit, did you? A. No.

Q. That soil, or whatever you call it underneath it, that little, thin hard-pan, that is plenty hard for the side of the well, isn't it?

A. But I have good water there, better than anywhere in Sacramento.

WITNESS.—I sold ten hundred seventy pounds of grapes from my place this fall. I have given some away. There is more there I can sell if somebody comes to buy it. Ten hundred seventy-two pounds is all I have sold this year.

I do not patronize the fruit and vegetable man that has a business out there.

Redirect Examination.

I have lots of grapes on my place beside those I have sold. I have given away a lot. Robert spread the stuff that came out of the well pit on the ground

(Testimony of John Posehn.)

and he raises all the vegetables on that that he wants. That is good ground. When spread on the ground it will break up and crumble. There is nothing left. It is all just like the top soil. My son planted his vegetables on it. What came out of my well pit I put that on the road, but this that came [72] out of Robert's well pit he put that on the ground and grew vegetables on it.

Recross-examination.

I put that on the road to fill up a low place.

TESTIMONY OF F. E. UNSWORTH, FOR DEFENDANT.

F. E. UNSWORTH, a witness for defendant, testified:

I live in the Rio Linda district. My place is on the highway this side of the Rio Linda town site. I bought that place last October, a year ago. At that time it was improved. It had been planted to fruit-trees. I have five acres, about three and a half acres of fruit-trees. It is planted mostly to Tuscan peaches. A portion of my orchard is planted on less than five feet of soil. The shallowest, I believe, was thirty inches. It runs from that to four feet, or a little better. I understand my fruit-trees are about eight years old. I have had a crop from them. Their appearance as to size and health and general condition is very good. They have a good leafage. They are not stunted at all. I had a very good crop this year of Tuscan peaches. I got five

(Testimony of F. E. Unsworth.)

lug boxes on one tree. The average weight of a lug box is from about forty to forty-five pounds. Throughout the orchard the average was about three lug boxes to a tree. I sold about a hundred dollars worth altogether. There was a tremendous lot of peaches left on the place in addition to those I sold. The reason I didn't sell more was, there was no market.

I am not an easterner. I was not an eastern purchaser of this land. I have been in California since 1889, and have been in Sacramento County for about thirty years. [73]

I consider that the soil there around my place is adapted to the commercial raising of fruit. My vines grow very good. This is a picture of my place.

(The picture was offered in evidence as Defendant's Exhibit 8.)

Cross-examination.

I am a meat-cutter by occupation, and never had any experience in orcharding prior to October, 1927. Since that time I have been out in Rio Linda, and have sold about a hundred dollars worth of fruit off my place. There was that much more on the place that I could not sell because of market conditions. I have not been following my occupation as a meat-cutter since coming to Rio Linda.

TESTIMONY OF H. F. BREMER, FOR DEFENDANT.

H. F. BREMER, a witness for defendant, testified:

I live in the Rio Linda colony. I first purchased a piece of ground there in 1922. Then I bought eleven and a fraction acres. I came from St. Paul, Minnesota, where I was in the grain business. I bought this first piece of land in 1922. I came out here the same year. I engaged in the poultry business.

I planted a family orchard of fifty trees in a general variety on my parcel of land. Where I planted my orchard the depth of soil was about two and a half feet, some of it less, and some of it a little more. We did not blast for the trees at the time we planted. After they were planted the ground got dry and we blasted at the side of the trees. After blasting in that manner we found there was ample drainage for the trees. That took care of the surplus water and let it go down. I don't know how many sticks of [74] powder were used. I don't know anything about blasting, and hired it done. That orchard has made a pretty good growth. The trees were healthy and flourished.

After about two years I sold that place. A couple of years ago I purchased another place out there, about half a mile east of the first place I owned. I am now engaged in the poultry business. I have twenty-five hundred laying hens and some

(Testimony of H. F. Bremer.)

baby chicks. I have planted a few fruit-trees for family use on this place. I did not blast for them. They are growing well so far.

I have had occasion to pass by and see the land that I formerly owned, and have observed the fruit-trees that I planted every time I go by the place. Their present condition is very good. They have made a good growth. I am familiar with the fruit-trees I see around the district. Those appear to have made a consistent satisfactory growth in comparison with fruit-trees of that age, quality and kind. I have seen some fruit off the trees. They have made a good production. In my estimation they bear very well. The quality and size of the fruit is good.

This is a picture of the place I formerly owned, and some of the fruit-trees that I planted there.

(The picture was offered in evidence as Defendant's Exhibit 9.)

Cross-examination.

I had no experience prior to 1922 in raising fruit. It was in that year I planted the first orchard. I cared for that about a year. In 1926 I planted twelve more trees. That is my whole experience. I have never sold any fruit. [75]

TESTIMONY OF JAMES GEDDES, FOR DEFENDANT.

JAMES GEDDES, a witness for defendant, testified:

I live in Sacramento, and have lived here for thirty years. I am familiar with the farming territory around Sacramento and have been interested in real estate to some considerable extent, and have bought and sold lands throughout the County. I know the territory that was formerly known as the Haggin Grant, or the Rancho Del Paso, before it was subdivided and sold in small parcels. I have known the territory known as Rio Linda since 1912, the time that it was first carved from the original grant, and have watched it develop. I have bought and sold land in Rio Linda. I know the property involved in this action, the Lindquist property, described as Lot Number Nineteen of Vineland. I have looked it over. In 1921 the reasonable value of that parcel of land during the month of September was about three hundred fifty dollars an acre.

I know what the people are doing generally throughout the colony. The principal industry at the present time, and for the past few years, has been the poultry industry. I have seen fruit-trees growing here and there around the colony, and about the location of this particular tract. I know the character and quality of the soil in the neighborhood. It is demonstrated by stuff growing there at the present time.

(Testimony of James Geddes.)

As to this particular lot, I would hardly consider the land adapted to the commercial raising of fruit on ten acres. Ten acres is not big enough for a commercial orchard, but the ground itself does produce fruit commercially. There are orchards all through the district that show that.

I have had something to do with the fruit business and dealing with fruit lands in Sacramento County and in Yolo. I have [76] owned orchards in Yolo County for thirty-five years. I was outside man for the Southern California Canneries, which is now a part of the California Packing Corporation, and have bought fruit all over the country. In that capacity I was required to examine orchards and observe their productivity. I have also seen and noticed the orchards around through the Rio Linda district, and have noted the growth of fruit-trees and the condition and quality of the soil. In my opinion, that land is adapted to the commercial raising of fruit.

Cross-examination.

I am engaged in the business of buying land now, when I see something that suits me. I am not a speculator in land. I try to play a safe game in buying land. I have been interested in recent times in the purchase of a million dollars worth of land near Folsom. I am personally interested in that. I have put up my own capital with the Capital Dredging Company. That corporation is located in Boston. There is no agent or repre-

(Testimony of James Geddes.)

sentative of that corporation in Sacramento. I did not deal with any person in connection with the Capital Dredging Company. I bought the property and held it in my own name, and then we formed the company and I merged the lands into the company. We formed a corporation for the purpose of dredging those lands for gold. I am not a promoter of that corporation, I am not a member of the board of directors. I have some stock in the corporation and helped form it.

The reason I appraise this land at three hundred fifty dollars when I appraised the other Lindquist place at three hundred twenty-five dollars an acre, is that the other people had a little draw through their land and it would probably cost twenty-five or thirty or forty dollars per acre to level it up and put it in shape. This is a better piece of ground. It is closer to the road, [77] it is better lying. It is closer to Rio Linda. I think it is a better piece of property. The other is further away.

I don't think there was any electric power there in 1921. I think it has been put in since. There were power lines through there, but there was some trouble about 1921 or 1920 in getting the distribution of power. The power companies were not willing to extend their lines.

I have never heard that that land was sold in 1910 or 1911 for twelve dollars and a half an acre. I know George P. Robinson, the real estate dealer here. He never owned any land there. He never acted as agent for the sale of land there. He and

(Testimony of James Geddes.)

Morris Brooks were mixed up in trying to get the original deal, and I know the 45,000 acres was sold for about fifty dollars an acre. There was no $12.50 an acre land there. Nobody could find anything like that. I heard that stuff before, but I could never find it. George P. Robinson never was trying to sell that land at $12.50 an acre. The land was sold as a whole. The Haggin people would not talk sale unless it was sold as a whole. It took a great deal of money to make that deal.

Q. I am asking you now whether George P. Robinson had a part of the Rio Linda section for sale at $12.50 an acre.

A. Oh, he may have away out beyond the Strauch lands. Rio Linda is within the grant, and the grant was to be sold as a whole, the entire 44,600 acres had to be sold as a whole.

Q. The Strauch lands are within this section, aren't they?

A. No, they are out beyond Rio Linda.

Q. Aren't there some of the Strauch lands within that section? A. No. [78]

TESTIMONY OF LOUIS TERKELSON, FOR DEFENDANT.

LOUIS TERKELSON, a witness for defendant, testified:

I live in Rio Linda upon the highway this side of the town site of Rio Linda. Before coming there I lived in Southern California. I had been engaged in the fruit business. I have been engaged in that

(Testimony of Louis Terkelson.)

business over thirty years. I have lived in California around thirty or thirty-five years.

I made my purchase of land in Rio Linda about fifteen years ago. I have forty acres. Twenty-eight acres is planted to fruit. I have no other business except the commercial raising of fruit, and have been engaged in the raising of fruit commercially ever since I moved to Rio Linda. I have in my orchard about three and a half acres of Bartlett pears. Some of those trees are planted on soil less than five feet in depth, and some on soil as shallow as three feet or three and a half feet. The trees on that shallow ground there are about thirteen years old. They are still alive and growing. As to my Bartlett pear trees, on this upland shallow soil I do not have much trouble with blight. I do not have as much trouble with blight on shallow ground as they do on river bottom land. My trees have given a good, healthy normal crop. From my Bartlett pears I have had a good crop. It varies. Some years are better than others. I had a very heavy crop in 1926. It was not so heavy this year. It was rainy in the blooming season and the bees could not work to pollenize the blooms, and so they did not set. There was nothing in connection with the soil, its depth or condition or quality, that in any way interferes with the growing of fruit on the ranch.

I have something like twenty or twenty-five acres of almonds, which is my principal orchard. The almond trees are about thirteen or fourteen years

(Testimony of Louis Terkelson.)

old. I planted them myself when I [79] moved there. They have made a good growth. Some of those trees are planted on soil less than five feet in depth, some as shallow as three feet or three and a half feet. The trees grow well on that soil, and have produced almonds. They have made a good growth and have produced good crops. I believe that soil is adapted to the commercial raising of almonds, where it is as shallow as three and three and a half and less than five feet. My production has proved that to me.

I know the Unsworth place. I know that orchard and what it has produced. He had a good crop off his peach trees, but no market. The crop was good last year and the year before. It has borne good crops right along. I have known that orchard since it was set out. It was blasted in the center of the tree rows. He gets sufficient drainage where his orchard was blasted. The water goes through the hard-pan. It looks like it.

This is a picture of my almond orchard. The trees show without leaves because in the fall when we harvest the almond crop we use long poles and knock them off on sheets, and the leaves come down with the fruit.

(The picture was offered in evidence as Defendant's Exhibit 10.)

Cross-examination.

I don't know where the land involved in this action lies. I don't know the property.

(Testimony of Louis Terkelson.)

The average depth of soil on my place is around four or five feet. I think that the average is four feet, or five, I couldn't tell exactly. Heretofore I have always estimated it at five feet. [80]

TESTIMONY OF H. L. WANZER, FOR DEFENDANT.

H. L. WANZER, a witness for defendant, testified:

I am employed by the Capital Building and Loan Association of this city. I own a piece of property in the Arcade district, lying about a mile to the southeast of the Rio Linda Subdivision. I have owned that property since 1922. I have thirty acres there. The parcel I own is on the upland, that is, the highland. All of it is planted to fruit. The land is underlaid with hard-pan. In planting my trees I blasted through. The depth of soil above the hard-pan runs from three feet to six feet. I have a considerable area less than five feet in depth.

I have apricots and canning peaches planted there. I planted the trees in blasted holes. They are growing successfully. I have had no loss of trees due to insufficient drainage.

The trees were planted in the spring of 1922. They have made as good a growth as any trees in the country around there. I am satisfied with the growth.

My trees have produced very well. The first crop I got was two years ago. It was over a hun-

(Testimony of H. L. Wanzer.)

dred tons off twenty-five acres of peaches. That would be four tons to the acre. I thought that was a good production considering the age of the trees. It is satisfactory to me as a fair average production.

My apricot trees have produced in about the same proportion. The hundred tons that I speak of was not this year's crop. I had as much fruit this year, but on account of the peach market and the way the canners are treating the growers I could not dispose of as many of them. When I spoke of a hundred tons I meant that I actually marketed a hundred tons. At that time part of the crop remained on the trees, due to marketing conditions. This year my production was a little better on account of the age of the [81] trees, but the marketing conditions did not permit me to sell as many. The canners established a stiffer grade and would not accept peaches with any defects in them whatever.

That land raises excellent fruit.

I am familiar with the district known as Rio Linda. I was with the original company that purchased the entire Haggin Grant for quite a number of years, and during that time I had occasion to go through all of these lands.

Q. Considering the character, soil, and the depth of the soil, and its quality in the Rio Linda District, is there any reason you know of why that district will not produce fruit in commercial quantities, as well as the district to the south? Putting it an-

(Testimony of H. L. Wanzer.)

other way, do you believe that the land in Rio Linda is adapted to the commercial raising of fruit?

A. Not as well as on the easterly side of the Rancho Del Paso, on account of a slighter elevation, and more drainage.

Q. Aside from that, taking the soil, and the depth of the soil, and considering that the drainage might be provided for by blasting, then would you consider that the Rio Linda lands are adapted to the commercial raising of fruit? A. Yes.

Q. Not comparatively in connection with other sections, but standing by itself, you think it would, do you?

A. If there was a sufficient amount of blasting to make up for the drainage that the other country has on account of the uneven contour, conditions would be equal.

Q. Blasting in any particular section has to be done, if properly done, in accordance with the contour and the hard-pan in the particular section; is that not true? A. Yes.

Mr. BUTLER.—You may cross-examine. [82]

Cross-examination.

Mr. LEWIS.—Q. You do not consider hard-pan injures the soil sufficiently for fruit raising, do you?

A. I would not buy it for that, no, sir.

Q. You do not think it would be particularly adaptable to raising fruit?

A. Fruit could be raised on it, if it were blasted sufficiently.

(Testimony of H. L. Wanzer.)

Q. You mean if you used an excessive amount of dynamite, or dredged it, or something of that kind, do you?

A. If you used a sufficient amount of dynamite.

Q. It would take a good deal of it, wouldn't it, to get through that crust out there?

A. Dynamite is cheap.

Q. It would take a lot of dynamite, would it not?

A. Not so much, no.

Q. You used to be connected with this company, did you not? A. Yes.

TESTIMONY OF WALTON HOLMES, FOR DEFENDANT.

WALTON HOLMES, a witness for defendant, testified:

I owned some property in the Arcade district up to February of this year. I had owned that property for six years. I had twenty acres there. It was planted to canning peaches and apricots.

There was a hard-pan underlying the top surface. The depth of soil throughout the orchard varied from eighteen inches to six feet or so. It was all upland. It bordered on a creek. Away from the creek bottom the soil was from eighteen inches to perhaps four or five feet in depth. A considerable quantity of the [83] soil was less than five feet in depth. I blasted for the trees and found that blasting provides ample drainage. I think my trees made a little better growth an average on the blasted ground in the hard-pan land.

(Testimony of Walton Holmes.)

I had a crop from the orchard. In 1926, the first year, I delivered eighty-three tons from twelve acres of peaches. They were four years old then. I would say that was a good production considering the age of the trees. That year there was no ungraded fruit left on the trees. The market absorbed nearly all of it.

I consider that land adapted to the commercial raising of fruit.

Cross-examination.

I am vice-president of the Capital National Bank. I have been in that occupation for twenty-one years. I am not a fruit raiser outside of this adventure. That was not an unprofitable adventure. I did not lose any money. So far as fruit was concerned, I broke even on that. The fruit adventure has been very unprofitable the last two years, in raising canning peaches, on account of the marketing conditions. The first year was profitable.

I consider that soil eighteen inches in depth is adapted to the raising of deciduous fruits commercially because my practical experience prompts me to form that opinion. All I have to go on is my actual experience in that one adventure.

My land is well drained. It is rather sloping. It has a creek at the back end of it. Some of that land has no hard-pan in it at all.

Q. So that the very little that was eighteen inches in depth would not compare with the land that was deeper: Is that not true? [84]

A. It had drainage, it had a slope to it.

(Testimony of Walton Holmes.)

Q. And the underlying hard-pan sloped off, also, did it not, so that the water would run off?

A. I don't know how the hard-pan sloped. I could not see the hard-pan.

Q. And you did not check up the hard-pan, did you?

A. We blasted it. I could not tell the slope of it.

Redirect Examination.

Mr. BUTLER.—Q. The land where you did not have hard-pan, or where you did not find the hard-pan, was on the creek bottom land, wasn't it?

A. Yes.

TESTIMONY OF E. E. AMBLAD, FOR DEFENDANT.

E. E. AMBLAD, a witness for defendant, testified:

In September, 1921, I was the sales manager of the Sacramento Suburban Fruit Lands Company, and I was acting in that capacity for quite some time. I have not been in the company's employ for a number of months now.

I met and had dealings with Mr. Lindquist and other members of his family leading up to this contract dated the 29th of September, 1921. That evening was the first time I called on and met Mr. H. A. Lindquist. I had never before met him or discussed with him the purchase of land in Rio Linda. Several of their friends had purchased land out here at Rio Linda, and Mrs. Lindquist had been

(Testimony of E. E. Amblad.)

talking with Mrs. Anderson, and through her I met these people and arranged for an appointment two or three evenings later, and I went over in the evening and spent two or three hours there. When I called there Mrs. Anderson was in for a little while and the two brothers and their wives. At that [85] time they told me that they had been discussing Rio Linda with some of their neighbors. They seemed to be familiar with the project and with the literature that I had.

No conversation took place between me and Mr. H. A. Lindquist regarding the commercial raising of fruit. I did not tell him that the Rio Linda Colony, or particularly this Lot Number Nineteen of Vineland, or any lot in Vineland, was specially adapted to the commercial raising of fruit. Fruit was discussed between me and Mr. H. A. Lindquist that evening. We talked about a family orchard. We did not discuss the question of fruit to be raised commercially. I did not tell Mr. H. A. Lindquist, or any of the other people there, in his presence, that the plan for them in coming out here was to start in with the chicken business and to plant a commercial orchard, and to carry on their chicken business for a living until their commercial orchard came into bearing.

The principal topic of conversation with respect to their business that they intended to engage in was poultry. Leading up to it Mr. Lindquist told me his health was poor; that his doctor had advised a trip to the old country, which he had made a year

(Testimony of E. E. Amblad.)

or two previous to that, and on his return to Minneapolis his old trouble returned and he was advised to change climate. At that time his friends had all gone out there. There were half a dozen families from that neighborhood that were making up a little colony to move out here, and four or five of them had already purchased. That seemed to work in with his plan for a change of climate, and they decided to go along. We talked principally about the poultry industry as it is conducted here in Rio Linda. [86]

I described to him the operations of the poultry association and the cost of being a member and the way he would obtain his feed as a member, the marketing of their eggs, and the advice and assistance he would get.

At the time this Lot Nineteen was discussed there was on it a poultry-house and a well. I was uncertain about the size of the poultry-house, and told him it was about four sections, but it was a little short of that and the company made it good after he arrived here. Outside of the poultry equipment there was just a well drilled there.

He did not inquire of me at that time about the expense of planting an orchard, or the character of the trees to plant, or the expense of maintaining an orchard. I only told him about planting of a family orchard such as all the people planted at Rio Linda, and that they did it to beautify the place and to help the family, and that the adviser here would tell them after they arrived how to

(Testimony of E. E. Amblad.)

plant it and how to care for it, pruning, irrigating and all that.

I had been out to California quite a number of times. I had been out the previous winter, a few months before. At that time there were about a dozen families residing in the Vineland Subdivision.

Cross-examination.

They were not on the adjoining land. There were about a dozen families within a radius of a quarter to half a mile. Most of them had been there two or three years. The last trip I made before talking to these people was in April, I think.

I was the sales manager of this concern. I heard of these people through Mrs. Anderson, and Mrs. Peterson and Mrs. Carlson. [87] I went to see them. I had a booklet in my possession, an album with pictures in it, an assortment of pictures I had taken at the various times I had been out there.

I discussed how much land these people were buying in that case. They indicated they wanted to buy the same that the other friends had bought, who had all bought ten acres apiece. I had no conversation with them about planting other things than a family orchard. Nothing was said about utilizing the remainder of the tract. There was no discussion about the well on the place. I did not know much about the well, except I had a letter from our Sacramento office that this place was partly improved with a well and a poultry-house. I may

(Testimony of E. E. Amblad.)

have told them that the well on the place was sufficient to irrigate the whole ten acres. The well had been put there by the previous owner, with the idea of irrigating the whole ten acres, and he could do it if he wished. I don't remember whether I told the Lindquists they could irrigate the whole of the ten acres from that well. I am not positive about that. I wrote that there. There was a question as to whether the poultry-house and the well were in good condition. I did not know. I told them I would guarantee it would be in good condition and it was put in there for that reason. I meant just what I said, that it had on it a chicken-house of the Lyding house, together with a well of sufficient size to irrigate the tract. I didn't mean that the Lindquists were to irrigate the entire tract. They didn't talk about anything of the kind. They didn't talk about any commercial orchard. It was just simply to make the statement that we would put the well and the poultry-house in good condition.

It would take more than two acres to put up a living-house and a chicken-house and a family orchard. When you have [88] twenty-five hundred chickens or three or four thousand chickens it would take more than that. It would take ten acres with a family orchard. I know of a place where there are only twenty-five hundred chickens, where they use the whole ten acres. That is Mr. Bremer's place. I think he uses the entire tract for chickens, and he has a family orchard on his

(Testimony of E. E. Amblad.)

place. I imagine the chicken-yard covers the whole place.

I did not tell these people that this land was specially adapted to raising deciduous fruit. I told them it would raise certain kinds of fruit, but they would have to consult our horticultural adviser when he selected his family orchard as to what would be the best to put in there. I did not tell him it was specially adapted to the raising of all deciduous fruits commercially. We discussed the booklet and read it through that evening.

Redirect Examination.

Q. Did you discuss the poultry features of the book that evening?

A. Yes, that was the principal topic.

TESTIMONY OF ARTHUR MORLEY, FOR DEFENDANT.

ARTHUR MORLEY, a witness for defendant, testified:

I live in the Arcade district, south of Rio Linda, about a mile from the south line of Rio Linda. My place is on the upland. I own about seventeen acres. I have owned it about eight years. At the time I bought the property it was improved. There was no house on it, but the trees were planted.

The depth of soil is about a foot and a half to three feet. It was blasted. I found that there is ample drainage for the trees by reason of the blast-

(Testimony of Arthur Morley.)

ing. I have mostly plums. I have had a crop off my trees every year since I have been there. They bear [89] very well. The trees are in a good healthy condition, with a very satisfactory growth. I have been in the fruit business about sixteen or seventeen years. I have had experience on both river bottom lands and uplands. I am familiar with fruit growing on river bottoms, as well as on the uplands. Nearly all of shipping varieties of plums, peaches and apricots is grown on the uplands. It has a better carrying quality. They are firmer. They usually demand a better price for that reason. They have a better sugar content.

I am familiar with the peach growing district around Auburn, Newcastle and Penryn. That is a fruit shipping district. It is practically all shallow soil. A good deal of it is granite.

I am familiar with the fruit growing district around Oroville. That is a hard-pan district. They usually blast for the trees there. Commercially on that soil they raise quite a lot of olives and oranges. The Oroville olives and oranges are very good. They are both raised on shallow hard-pan land. They blast.

I have been over some of the peach growing districts back from the river bottom in the Sutter County area. They raise peaches on hard-pan ground in Sutter County successfully and commercially.

I have been around through the Rio Linda district to some considerable extent. I put in thirty

(Testimony of Arthur Morley.)

days or more there in the employ of the Company in looking over the agricultural situation.

Q. Did you make a count of the fruit-trees and the vines growing in the district while you were making this survey? A. Yes.

Q. Give us the figures, please.

A. We found there were almonds 18,720; olives 9,370; peaches 7,060; plums 2,950; pears 8,875; prunes 6,040; figs 10,230; apricots 1,550; walnuts 490; cherries 9,465; apples 600; persimmons 100, making a [90] total of 83,650.

Q. That did not include the family orchards, did it?

A. No. We estimated about 325 family orchards, 25 trees to the orchard.

Q. Which makes a total of 8,100 more?

A. Yes.

Q. What is the grand total of trees?

A. Trees, 91,750.

Q. And the total number of vines in the district?

A. About 100,900.

WITNESS.—As a practical orchardist I do not know any rule which requires a minimum of five feet of soil as necessary for the successful growing of fruit-trees commercially. I have been associated with practical orchardists for some time, and I never heard of such a rule mentioned or discussed. In my opinion, it is not necessary that five feet of soil be present in order to successfully grow fruit. Everything from here to Fair Oaks is on practically less than five feet of soil. Fair Oaks and Car-

(Testimony of Arthur Morley.)

michael, and Florin among the grapes, that is shallow soil. Florin is generally recognized as a grape growing district, celebrated for its table grapes, one of the best in the state for table varieties. In my opinion I think the soil, considering its depth and character of the hard-pan when blasted, is adapted to the commercial raising of fruit.

With respect to the orchards throughout Rio Linda we found some very nice orchards, and some that looked as though they had been neglected. They were not doing so well. When I found an orchard that had been cared for, properly cultivated and irrigated, I found the condition of the trees and crops to be good. In my opinion, the growing of fruit in Rio Linda is dependent upon care more than upon soil. [91]

We made an investigation to determine whether root growth would penetrate into hard-pan where blasted. We dug beside some olive trees and a plum tree. In respect to the plum tree we dug down about four feet and found the roots were extending into the substrata, and as to olive trees, the same. We made an excavation about four or five feet deep by the olive trees, and we found the roots going down to the ground that far. We did not get to the end of the roots. They were running sidewise into the hard strata.

I have had experience with blasting in that district. Where the ground is blasted and the hard-pan and subsoil there thrown up and exposed to

(Testimony of Arthur Morley.)

the air, it slacks. In twelve months afterwards I would not notice any of it, except the hardest, about one inch. You would probably find that everything else would be slacked.

I found the general thickness of the hard-pan stratum to be usually from one inch to two inches or something like that. I made excavations at Rio Linda to determine the thickness of the hard-pan and I found that to be true of the Rio Linda district. Underneath the hard-pan we found a softer substance.

The samples shown me, Plaintiffs' Exhibit "B," corresponds pretty generally with the top layer of hard-pan I have just mentioned. I found that to be just a few inches thick. It is very seldom you get it as thick as that. If that is broken the strata underneath it will allow the penetration of moisture. When that substrata is first exposed it is pretty hard when it is dry. When you wet it it will soften. It will not cement itself after it is wet. I think that substratum and hard-pan, when disintegrated, will support plant life. I have seen vegetation and trees growing in it. It is usually scattered around the lawn and gardens and everything grows nicely on it. [92]

I have seen these pictures of the excavation made by the olive trees. You can see the roots going down through there.

(The pictures were offered in evidence as Defendant's Exhibit 11.)

There was an olive tree growing where this ex-

(Testimony of Arthur Morley.)

cavation was made. It had been blasted. There was twelve inches of soil on top of the hard-pan.

Cross-examination.

I know the place where I took these pictures. I believe it is owned by a man named Smith. Mr. Smith was not working the place at the time. As to the condition of fruit in that orchard, there was a very light crop of olives. All over the district this year there was a light crop of olives. I did not make any investigation to determine whether that orchard was commercial profitably. I have testified about that orchard repeatedly since these cases started last month, and I have been repeatedly asked whether that orchard was commercially profitable. I have not gone out and made any investigation of that since these cases started. I was not interested in finding that out.

Q. Why did you pick out an olive tree to make these experiments?

A. We knew that those trees had been blasted, and we wanted to see what the effect of the blasting was.

Q. And you also knew that olive tree roots would penetrate a lot of places where the roots of other trees would not, didn't you?

A. No. All trees would act about the same.

Q. Were the feeding roots down in the hard-pan?

A. Most of the feeding roots were on the surface. The little feeding roots came out all the way.

[93]

(Testimony of Arthur Morley.)

Q. Feeding roots are in the first three feet, are they not?

A. Not very much; they are nearly all on top.

WITNESS.—I dug that excavation about four or five feet deep. I took a census of the trees in the Rio Linda district and spent about thirty days out in the district. Mr. Jarvis was with me. That is Mr. O. W. Jarvis. He used to be a Farm Adviser around here. He had a lot of experience as an agricultural expert. He was also in the special employ of the defendant company at that time. We went around and made an estimate of the trees in which we included the trees on the Stern place and the Tipper trees and the Haenggi trees. We found a lot of deeper soil of eighteen inches or two feet over in what they call the "Island" and in the creek bottoms and on the uplands too.

Q. The better kept trees were down in that island district, were they not?

A. We found a lot of trees growing nicely up on the uplands.

Q. Will you answer my question? The better kept trees were down in that island district, were they not?

A. There are a good many of them, yes.

Q. They were well taken care of?

A. Those trees were well taken care of.

Q. And those trees that did not show signs of care were all on shallow hard-pan land?

A. Some of them were, yes.

Q. Practically all of them were?

(Testimony of Arthur Morley.)

A. A good many of them were.

Q. Your principal business is caring for orchards for other people, is it not? [94]

A. No, that is part of my work.

Q. Do you derive your living from the seventeen acres you farm, or from the other work that you do? A. Off the farm.

Q. Off your farm?

A. Partly from that. Orcharding work is seasonal, and I take a gang of men and superintend the pruning or the picking of crops.

Q. Which provides your principal income?

A. My orchard does.

Q. The other provides about half of it, doesn't it?

A. Yes, my spending money.

Redirect Examination.

Mr. BUTLER.—Q. The orchards in the bottom lands, or the island district, are practically all commercial orchards, are they not?

A. Yes.

Q. And the orchards you found on the uplands are practically all family orchards—smaller orchards?

A. Yes, most of them not coming into bearing yet.

Q. Young trees? A. Yes, young trees.

TESTIMONY OF F. E. TWINING, FOR DEFENDANT.

F. E. TWINING, a witness for defendant, testified:

I am an agricultural chemist. I live in Fresno.

(Testimony of F. E. Twining.)

I have lived in California for thirty years last spring. I have been engaged in that line of work for twenty-eight years. I maintain in Fresno a laboratory, known as the Twining Laboratory, which is the most complete commercial laboratory on the Pacific Coast. During the time I have been in business I have had occasion to examine a great many of the orchards and vineyards on the orchard and vineyard land up and down through the Sacramento and San Joaquin [95] Valleys and in Southern California and Arizona. In the Fresno district there are thousands of acres on the upland there with a hard-pan base such as we have in this part of the country. Part of that hard-pan land around Fresno was planted to orchards. They are raising orchards commercially and profitably on the Fresno district on hard-pan land of shallow depth. Where that land is very shallow it is customary to blast for the planting of orchards. Fresno ranks as one of the principal grape-growing districts of the state, raising principally raisins, and also table grapes. We find a considerable portion of the shallow hard-pan land devoted to grape culture.

It is not customary to blast for the planting of grape-vines. A good many vineyards are blasted, though, on very shallow land. I don't know of any rule among horticulturists prescribing a minimum limit of five feet of soil as necessary for the growing of fruit-trees.

There is one orchard of twelve thousand acres

(Testimony of F. E. Twining.)

in the Fresno district devoted to the raising of figs. It has been sold out a good deal, practically all to local people in Fresno. I was acquainted with the conditions there at the time that orchard was planted. That is a hard-pan land. As to the depth of soil throughout that orchard, the hard-pan is at the surface in places. It probably averages from one and a half to three feet, in some places a little deeper, but most of it very shallow. Practically all of it was blasted.

Q. With respect to the character of the hard-pan and the subsoil how does it compare with the hard-pan and subsoil in the Rio Linda district?

A. The hard-pan is a little harder. There is more iron in it and [96] therefore it is harder and tougher hard-pan, but the soil is the same type of soil.

WITNESS.—Soil of that character when blasted is adapted to the raising of fruit commercially.

I am familiar with the Florin district, which is given over mainly to table grapes. That is hard-pan land with shallow soil. A very fine quality of grapes is grown there.

I am familiar with the Oroville district. A good portion of the fruit raised in Oroville is on shallow land which has been blasted. Principally, they raise there olives, oranges, and some figs. The quality of the olives raised there is some of the best in California, and the oranges have the same high quality and early maturity. A good deal of the

(Testimony of F. E. Twining.)

peach-growing district of Sutter County is on hard-pan land.

Q. From your experience up and down through the Valleys of the State of California, is the presence of hard-pan detrimental to the growing of fruit?

A. The depth of the hard-pan must be taken into consideration.

Q. You mean the thickness of it?

A. The thickness and the general character of it. If it is very shallow, that is if the soil is shallow and the hard-pan near the surface, it should be broken up, but, depending on the method of irrigation, three feet of soil will grow most plants, three or three and a half feet.

Q. If you have a shallower soil than that, say a depth of twelve inches, eighteen inches or two feet, can you by blasting put that in shape where it is adapted to the commercial growing of fruit? [97]

A. Blasting and subsoiling in certain character of hard-pan, yes.

WITNESS.—The purpose of blasting and subsoiling is to open up the subsoil so that water will penetrate below to provide drainage and a certain area that will hold moisture. The detrimental character of shallow soil is its inability to hold moisture.

I am familiar with the Rio Linda district. The soil out there is capable of being prepared by blasting for the commercial raising of fruit. The cost of blasting will vary. I would estimate it from twenty to thirty dollars an acre.

(Testimony of F. E. Twining.)

I have made between three and four hundred tests and borings throughout the Rio Linda district. They have been over the entire district, on the upland. I have also made chemical tests of the soil scattered pretty well over the entire district. There is not a great difference in them. I have made a test of the chemical content of the soil on this particular Lot Nineteen of Vineland. The phosphoric acid total is .21, or 8,400 pounds per *acre*. The total potash is .98, or 39,200 pounds per acre-foot. The acid soluble portions, phosphoric acid .17, and potash .8. My analysis was also made at a three-foot depth. I found there phosphoric acid .17, potash .72.

Q. What is the volume or quantity of potash and phosphoric used by an acre of fruit in a year's time?

A. Phosphoric acid twenty-five to fifty pounds. Potash, fifty to a hundred.

WITNESS.—There is a sufficient quantity of phosphoric acid and potash in the soil on this land to last for the raising of fruit for [98] a good many years. There is no deficiency in the soil as far as those two elements are concerned.

Q. From your examination, chemically and otherwise, your tests and your borings, is that Lot Nineteen of Vineland adapted to the commercial raising of fruit if the ground be prepared by blasting?

A. Yes.

Q. Do you know of anything in the soil there that is detrimental to the raising of fruit? A. No.

WITNESS.—At the points that I bored the hard-

(Testimony of F. E. Twining.)

pan was about two to two and a half inches thick. Underneath that I found a strata of varying density, slightly sandy or with clay more or less hard, but softening readily when wet. Going down for the purpose of digging a pit, when you get through the hard-pan the underlying strata can be broken with a pick. It is easier to shoot it with dynamite and it works faster. If the underlying strata is subjected to water it will soften and provide drainage, and also provide moisture for the use of the plant.

This is a sample of the top stratum as I took it from that place. That is the hard-pan with the impervious layer on the surface. When I say impervious I mean it will not permit water to pass through. The water does not pass through the red portion there, but the balance will absorb water quite readily when exposed. If this is broken and thrown out on the surface and allowed to stand exposed to the air and rainfall, it will slack. Rain will soften it and it will break down. Any considerable pile of this will disintegrate in a year very readily when it gets wet and will form soil. There is nothing in the hard-pan below the impervious stratum that is detrimental to plant life. The chemical constituents of [99] this, and the subsoil, as compared to the top soil, are very similar. There is not a great difference.

Q. Here is a sample that has been introduced in evidence as Exhibit No. 5. Will you look at that

(Testimony of F. E. Twining.)

and state whether or not that is hard-pan, top layer, or subsoil? A. Yes.

Q. That is hard-pan.

A. Yes, that is hard-pan. You might say there are two hard-pans, although the chemical composition is very similar. One of them has more iron in it.

Q. That is this Exhibit 5 that I have here?

A. Yes.

Q. This layer of hard-pan, you found it in other places, did you? This iron-colored hard-pan?

A. Yes.

Q. Do you find the thickness of that stratum to be generally uniform?

A. It will vary from two to three inches. Usually the red is shallower than the white. I would say from an inch to two or three inches.

Q. And is that readily broken by blasting?

A. Yes.

Q. And when broken and thrown up will it provide drainage through the subsoil underneath?

A. Yes.

Q. Is there any reason that you know of why fruit cannot be grown successfully and commercially on that class of land under discussion here?

A. No.

Cross-examination.

I was not connected with the Faulkner fig orchard. I was not employed by that company to make tests. I was employed by a number of peo-

(Testimony of F. E. Twining.)

ple who had purchased land down there to make tests [100] upon the land. That was not a colonization scheme. It was subdivided and practically all of it was sold to Fresno people for the purpose of raising figs. My examination there was not carried on in connection with the sale of land.

I made an alkali survey of fifty thousand acres for the United States Farm Lands Company. They owned land located in Madera and Merced Counties, and were selling to anybody who wanted to buy land. You can call it a colonization scheme.

I have been in Oroville a good many times the last thirty years. I was up there about two months ago. I was not there in connection with some colonization scheme. I did not go there to make an investigation of colonization lands that were involved up there.

There is nothing in the soil in Rio Linda that is detrimental to the growth of orchards. The hard-pan in itself is not detriment except physically, because it interferes with irrigation if it is near the surface. The clay that lies over the hard-pan will soften up when wet. The density of the soil there is not detrimental to the raising of fruit. That is not the poorest land in Sacramento County. There are river bottom lands of some of the Redding series of gravels that are much poorer.

Q. You mean the river bottom land where there is alkali?

A. I would not necessarily pick out alkali. I would pick out certain sandy soils in the Redding

(Testimony of F. E. Twining.)

gravels. Lots of them are devoted to orcharding. They are not as good as the soil around Florin or Rio Linda.

WITNESS.—Heretofore I have told you that the land in Sacramento County that was the worst is down in the southeastern portion. That [101] is the Redding gravels. It is possible that I did not mention river bottom lands before, but I am mentioning it now. Some river bottom lands are worse than Rio Linda. I am talking about spots. I do not mean where there are bog holes and alkali.

Q. The depth of the soil is of great importance in selecting land for the planting of an orchard, is it not?

A. If a person has a deep soil they don't have to break up the hard-pan or do the blasting.

Q. Do you consider the depth of soil of great importance? A. Not necessarily.

Q. You do not consider that shallow soil is often a liability, do you?

A. No. I think that every shallow soil required some preparation.

Q. Do you consider they are often a liability?

A. I know where they are beneficial.

Q. I am asking you this question: Shallow soil is often a liability, is it not?

The COURT.—Well, what do you mean, Counsel? Make your question clear.

The WITNESS.—Yes, that is what I say, let me understand what you mean.

(Testimony of F. E. Twining.)

Mr. LEWIS.—I am asking him if he considers that it is a liability.

The COURT.—Make your question so that the jury will understand it and the Court will understand it. What do you mean by "liability"? In what respect?

Mr. LEWIS.—Q. Rather than being profitable, it would be a liability to a farmer, would it not?

A. No, sir. I knew of hundreds of acres where hard-pan is a benefit [102] to the soil.

Q. Wouldn't it make the ground cold and wet?

A. A heavy soil without any hard-pan might be cold and wet, just the same, or a sandy soil in which the water table was high.

Q. Would hard-pan soil be considered cold and wet? A. Not necessarily, no.

Q. Are you familiar with Farmers' Bulletin No. 1088, issued by the Department of Agriculture?

A. I don't remember it right now; I have it, because I have all of those bulletins.

Q. Do you consider this statement in there false:

> "The depth of soil is of great importance and is a matter to which attention should be given when the land is first examined."

Do you consider that statement false, or true?

A. That is a general statement.

Q. Is it false or true?

A. It is neither false nor absolutely true.

Q. What about this statement:

(Testimony of F. E. Twining.)

"Shallow soil is often a liability, and its utility is sharply limited for practically all farming purposes."

Is that false or true?

A. That is an exaggerated statement.

Q. And also this:

"It is cold and wet in the spring."

A. Is that false, or true? A. Not necessarily.

Q. And this:

"The water-table being kept close to the surface." [103]

A. If the hard-pan holds the water it does. When I speak of hard-pan I speak of it with proper preparation.

Q. And this:

"And later on dries out rapidly and becomes baked and hard."

Is that true or false? A. Heavy soil?

..*A.* I am speaking of shallow soil.

A. If there was sand on your hard-pan, there are soils in California where there is sand, and it would not bake, at all.

Q. Take the Rio Linda soil.

A. All of your Madera and San Joaquin sandy loams will bake if they are not properly cultivated after being wet.

Q. And this:

"Such soils are quickly affected by drought."

A. Shallow soil, yes.

Q. That is true in Rio Linda.

(Testimony of F. E. Twining.)

A. That is true of any shallow soil; it is true also of poor sandy soil.

Q. Do you consider that the land out there, 22 and 25 inches in depth, is especially adapted to the raising of deciduous fruit commercially?

A. If the hard-pan is broken up so that the water will permeate, yes.

Redirect Examination.

The method for making tests on phosphoric acid and potash, the only one that is recognized at all, is ascertaining the total amount, or the fusion test. That is the method given by the Association of Official Agricultural Chemists. The method of the strong acid solution is not a standard method. Usually if we can keep potash and phosphoric in an acid solution we know it is enough [104] there for plant growth. If we do not get it we do not know what the total amount is. The only real recognized method is the total amount or the fusion method. The acid solution method was publishing by the Chemists Association in 1898 to 1903, as a method of making a soil solution for chemical analysis, but it was discarded about twenty-five years ago. The difficulty with the acid method is that in varying ways you will get different results.

Q. Do you mean by the quantity of the sample, the size of the sample?

A. The quantity of the sample, the agitation of the sample during the period of solution, the length of time, and so on.

(Testimony of F. E. Twining.)

Q. And the results are not uniform except following the same uniform method? A. No.

Recross-examination.

Q. The method requires it be agitated a certain amount of time, does it not?

A. The old published method of making the acid solution test does not say about the agitation. In making the acid solution it is now customary to actually boil the material, the solution of soil, for a period of several hours.

Q. And that is the way you made *you made* your acid soluble? A. Yes.

TESTIMONY OF HERBERT C. DAVIS, FOR PLAINTIFFS (RECALLED IN REBUTTAL).

HERBERT C. DAVIS, a witness for plaintiffs, in rebuttal testified:

The cost of blasting in the Rio Linda lands would vary from sixty to seventy-five cents per hole for a complete job. Ordinarily there are about eighty to a hundred holes to the acre. It is customary to boil the acid soluble method. It is digested [105] at a boiling temperature. I boiled mine.

Cross-examination.

I never shot a hole in the Rio Linda district, but I did right adjacent to it. I never blasted for a single tree in the entire twelve thousand acres of the Rio Linda district.

TESTIMONY OF JAMES B. LEITCH, FOR PLAINTIFFS (IN REBUTTAL).

JAMES B. LEITCH, a witness for plaintiffs, in rebuttal testified:

I live in Rio Linda. I know the Bremer place out there. I have known it since December, 1925. He has never used all of his ten acres for his chickens.

TESTIMONY OF IDA E. PERRA, FOR PLAINTIFFS (IN REBUTTAL).

IDA E. PERRA, a witness for plaintiffs, in rebuttal testified:

I live in Rio Linda. I know Mr. Lambert Hagel. I had a conversation with Mr. Hagel at Mr. Kral's house in November, 1927. Present at that conversation were my husband and myself, Mr. Kral and his wife, and Mr. and Mrs Klein. At that time and place he said to us that the Rio Linda land was too shallow for fruit-tree raising and it was foolish to plant tree fruit there and expect it to grow.

Cross-examination.

At that time, in November, 1927, we had commenced the lawsuit which my husband and I maintained against this company, a suit of the same character as the one which is now being tried. I believe it was in May, 1927.

TESTIMONY OF JOHN V. KRAL, FOR PLAINTIFFS (IN REBUTTAL).

JOHN V. KRAL, a witness for plaintiffs, in rebuttal testified: [106]

I am a neighbor of Lambert Hagel. I had a conversation with him on the first Monday in December. At that time he told me that it was useless to plant fruit on that shallow hard-pan land. He said he had not bought his land from this company; that this company had cheated all that had bought land from it.

Cross-examination.

I am a plaintiff in a suit of a similar character against this company.

Mr. BUTLER.—I desire to make a motion, if the Court please, for a directed verdict. I move the Court to instruct the jury to render a verdict in favor of the defendant upon the following grounds:

(1) That the evidence is insufficient to show that the defendant deceived or defrauded plaintiffs in making the contract referred to in the plaintiffs' complaint for the purchase by plaintiffs from defendant of land.

(2) That the evidence is insufficient to show that defendant misrepresented the quality or character of the land purchased by plaintiff from defendant, or the value thereof.

(3) That the evidence is insufficient to show

that plaintiffs have been damaged by any act on the part of the defendant.

(4) That the evidence shows affirmatively that plaintiffs' cause of action is barred by the provisions of Section 338, and of Subdivision 4 thereof, of the Code of Civil Procedure of the State of California, and that the evidence is insufficient to show that plaintiffs' cause of action is not barred by said above-quoted provision of said section of said code. [107]

The COURT.—The evidence is in conflict. It is a question for the jury to determine. It is sufficient if the jury takes that view. Motion denied.

Mr. BUTLER.—Exception.

Before the Court's charge to the jury, defendant requested the following instructions:

DEFENDANT'S INSTRUCTION No. 1.

You are instructed that in an action for relief on the ground of fraud, such as this case, the plaintiffs must show that the fraud occurred within three years of the commencement of their action for relief, or if their action was commenced more than three years after the fraud occurred, then they must show, in order to maintain their suit, that they did not discover they had been defrauded until a date within three years of the time they commenced their action.

With regard to this discovery of the facts constituting the alleged fraud, you are instructed that the plaintiffs will be presumed to have known what-

ever with reasonable diligence they might have ascertained concerning the fraud of which they complain.

You are instructed that the evidence shows that the alleged fraud was committed more than three years prior to the filing of the action, and your verdict must be in favor of the defendant, unless the plaintiffs have proven by a preponderance of the evidence both that they did not discover the alleged fraud within the period of three years before they filed their action, and that they could not have discovered it by the exercise of reasonable [108] diligence, three years before they commenced this suit. They were not permitted to remain inactive after the transaction was completed, but it was their duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to them. They are not excused from the making of such discovery even if the plaintiffs in such action remain silent. A claim by the plaintiffs of ignorance at one time of the alleged fraud, and of knowledge at a time within three years of the commencement of their action, is not sufficient, a party seeking to avoid the bar of the statute of limitations in a suit upon fraud must show by a preponderance of the evidence not only that he was ignorant of the fraud up to a date within three years of the commencement of his action, but also that he had used due diligence to detect the fraud after it occurred and could not do so. If fraud occurred in this case it was complete when plaintiffs contracted with defendant to buy land. Plain-

tiffs commenced their action on the 28th day of February, 1928; their contract with the defendant for the purchase of its land was made in September, 1921. If you believe from a preponderance of the evidence that the defendant committed a fraud upon plaintiffs in the making of this contract, then before you can find a verdict in their favor, you must also believe from a preponderance of the evidence that they neither knew of the fraud, nor could, with reasonable diligence, have discovered the fraud before a date three years prior to the commencement of their action, that is, before the 6th day of February, 1925. If you believe from a preponderance of the evidence that plaintiffs either knew of the facts constituting the alleged fraud before February 28th, 1925, or by reasonable diligence and inquiry could have learned these facts before that date, your verdict must be for the defendant. [109]

DEFENDANT'S INSTRUCTION No. 2.

You are further instructed upon the matter of plaintiffs' discovery of the alleged fraud that if plaintiffs discovered that a material representation concerning the land they bought was false, then they were at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring their action within three years of the discovery of the falsity of any material representation concerning the land.

DEFENDANT'S INSTRUCTION No. 3.

You are instructed that plaintiffs cannot recover in this action unless they were deceived by the alleged representations for if the means of knowledge are at hand, equally available to all parties, and the subject of purchase is alike open to their inspection, if the purchasers do not avail themselves of these means and opportunities, they will not be heard to say that they have been deceived, unless they were induced by trick or misrepresentation of defendant not to make such inspection.

DEFENDANT'S INSTRUCTION No. 4.

You are instructed that a representation which merely amounts to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit, though it may not be true, for a party is not justified in placing reliance upon such statement or representation. [110]

DEFENDANT'S INSTRUCTION No. 5.

You are instructed that if the plaintiffs discovered, or by the exercise of reasonable diligence could have discovered, the falsity of the alleged representations as to value of the land they bought more than three years before they commenced their action, then your verdict must be for the defendant. [111]

The COURT. (Orally.)—You have heard the

evidence, and the arguments, and now it is for the Court to deliver to you the instructions. These are merely to make you acquainted with the law which applies to the case, and in the light of which you will determine the facts. Remember, you take the law from the Court, but when it comes to the facts in the case, what witness to believe, what weight to give to the testimony, the inferences to draw from the circumstances, that is exclusively your function. The Court may comment on the facts, may express an opinion with respect to the facts, but unless it does so as a rule of law where there is no conflict in the evidence you are not bound by the opinion of the Court on the facts, and the Court does not seek to bind you. It may express it in the hope that it may aid you to reason out the case to a correct conclusion.

This is a civil action. The plaintiff purchased certain lands from the defendant in what is known as the Rio Linda District, adjacent to your city, some ten or twelve miles out. They paid $2,750 for ten acres of land. You can ignore the improvements, the well and the chicken-house, because there has been no question raised in respect to that value. The plaintiffs allege that they bought this land because induced thereto by false representations made by the defendant, without which they would not have bought it, they say. And they say that these false representations, taking the general statement of counsel in their opening, and in the course of the evidence and in their final arguments, in sub-

stance were that the land was adapted to commercial orcharding, and was worth more than $275 an acre. The allegations [112] in respect to the false representations by plaintiff set out in the complaint are different in language, but that is what counsel for both parties take them to mean, what I have indicated.

The plaintiffs are not obliged to prove the false representations literally. If they prove them in substance it is enough. So it comes down to that. They allege that the false representations were that the land was well adapted to commercial orcharding, and that the defendant also represented that it was worth more than $275 an acre, which they paid. The defendant denies that those representations were made, or were false if they were made.

The burden of proof is upon plaintiff. That simply means that after all the evidence is before you, Gentlemen of the Jury, and in consideration of it all, if you do not find that plaintiffs' case is sustained by the greater weight of the evidence your verdict must be for the defendant. Before plaintiffs are entitled to recover, it must appear to you from a consideration of the evidence that the vital elements of the plaintiffs' case have been proven—not one, but all of them, by the greater weight of the evidence. If you believe the evidence is equally balanced on any one of these elements, or if it weights heavier in behalf of the defendant, the defendant is entitled to your verdict.

Coming now directly to what the plaintiff must

prove as matter of law, the Court will say to you as follows:

First, the plaintiffs must prove that the representations were made. That is to say that the defendant, to induce this bargain, represented to them that the land was [113] well adapted to commercial orcharding, and worth more than $275 an acre. If plaintiffs prove either one of those representations it is enough to serve that branch of the case, and you proceed to the next step in the case. First, were the representations made? There is no question, Gentlemen of the Jury, that regardless of what Amblad may have said to the plaintiffs, and they say he did represent it as adapted to commercial orcharding, the defendant's book does make that representation. The defendant, being a corporation, it speaks by its agents, and its agents may speak orally or by advertising literature, such as this, which, of course, was prepared by some agent. So you find it in the book. No other reasonable interpretation can be placed upon it, and it was admitted in argument that the representation was made to the plaintiffs that the land was well adapted to commercial orcharding. No other reasonable construction can be made of it. It is not a question of how much truth is in the book, Gentlemen of the Jury, the question is whether that representation was made, and whether, as I will subsequently state to you, it was false.

In respect to the allegation that the representation was made, made to plaintiffs that the land was worth more than $275 an acre, both the plaintiffs

testify that Amblad did represent that to them. And the brother of the plaintiffs, who was there, testified to the same thing; and Amblad says nothing about that when he testifies. So there are the two plaintiffs and their witness testifying that the representation was made, and no evidence in denial on the part of the witness Amblad, who represented the defendant in that transaction.

If you find, then that those representations [114] appear to have been made, by the greater weight of the evidence, and that as to the adaptability of the land for commercial orcharding is clearly made in the book, then the next step is this: As matter of law, it must appear, by the greater weight of the evidence, that those representations, or either one of them, was false. That is the big issue in the case for you, Gentlemen of the Jury, was either of those representations, if both were made, false? Was the land well adapted to commercial orcharding? You have heard the evidence on both sides. The hour is getting late, and the Court will not attempt to detail it again to you.

Plaintiff presents certain witnesses who live on the Rio Linda lands, and have tried raising trees, as they tell you. They tell you the circumstances, and that after a certain two or three years, during which they flourish, they begin to fade, and become stunted, and some die. One of the witnesses for the plaintiff tells you that on the shallower of the soil the trees only attain a small growth, while on the deeper soil they grow better, indicating the inference he would have you draw, that the deeper

the soil the better the trees flourish. The evidence is that the soil is from eighteen inches in depth overlaying the hard-pan up. The witness Davis said the average is twenty-two inches, only. Mr. Davis is an agricultural specialist; he assumes to have a special learning in respect to this matter. He says that five feet of soil is necessary to the successful growing of trees as a commercial orchard enterprise. He gives you the reason; first, it must have the necessary food elements, and sufficient capacity to store them; it must have the necessary capacity to store water, and to furnish the trees [115] with moisture, and, at the same time, it must not be so shallow that the water will accumulate there and drown out the roots of the trees; and also necessary for anchorage and to perpetuate the life of the tree for a sufficient length of time so as to render the enterprise as a whole commercially profitable. You will understand, too, that defendant's book says that it takes five to ten years to bring an orchard to bearing commercially; of course, there is a long period of large expense which must be met. Whenever the orchard does begin to bear it must live long enough to liquidate all the past and all the future expenses while it is yet bearing, so that, on the whole, it will be profitable. Just like yourselves in business, in any business enterprise you have to liquidate all your preliminary expenses, your overhead, and the business has to last long enough so that it will, over the entire time, pay you some profit.

Mr. Davis further testifies that this soil is deficient

in the vital elements of potash and phosphoric acid. Those are vital elements, not only in the growth of all vegetation, but particularly in the production of fruit. He says there is only about one-third enough potash, and that the phosphoric acid is barely adequate.

Mr. Davis further tells you that it is impossible to blast this land, as some say, to prepare it for a commercial orchard, because the hard-pan is too deep, from six to sixteen feet, I think he says. He says if it were about two feet it might warrant the expense of blasting to make it a commercial enterprise, if the subsoil below the hard-pan could be reached, and thus afford drainage, and so the roots of the tree could penetrate and get that anchorage which is necessary, [116] and also so that moisture could be afforded. Mr. Davis testifies that he has had practical experience in that section, in Antelope, adjoining this land.

It is fair to say that, so far as practical experience goes to any great extent, there, I think it seems to me he has had more than anyone else, seven years on a large scale, some 150 acres of orchard, lands about like these in Rio Linda. He says so far as their depth is concerned, with the hard-pan below, that his seven years' experience proved what he had been taught in school, that those shallow lands over hard-pan will not afford a commercial orchard enterprise that will be successful.

Mr. Davis tells you how much he lost in the seven years that he operated at Antelope. He tells you

that his teaching in school was that it takes at least five feet of soil. I think he testified to that in this case. There are so many of these cases that we get mixed up on them, sometimes. Mr. Davis pronounces it as his opinion, as do some of the others that plaintiffs produced living on the land, that this land of plaintiffs will not produce the deciduous fruits commercially and at a profit.

The defendant resists the case thus made by plaintiffs, and to offset it they bring before you a number of witnesses who live on the Rio Linda lands and adjacent land, some who have their family orchards, some who have assumed to be engaged in commercial orcharding. Their testimony, as you will remember it, is that on these shallow soils, if prepared by blasting—and some say without blasting, some who have the small orchards, that their trees do well, and, in their judgment, they will produce commercial crops successfully. [117] Among those are Mr. Wanzer and Mr. Holmes, who have quite extensive orchards. Holmes sold his. They have been orcharding out in Arcade, not far from these lands, and the general situation seems to be much the same, except in so far as there may be local variations in depth of hard-pan, and its slope, to effect that essential drainage. They planted in 1922. In 1926 they had good crops, they say. They don't say what they had, if anything, in 1927. Mr. Wanzer said that in 1928 he had a larger crop, but that prices were such, that, I think, he did not harvest it at all.

The test of a commercial enterprise and land

adapted thereto is not its ability to produce a crop for one year, or its failure for one year, though a good crop one year might indicate it would do the same through a series of years, or a failure one year might indicate that it would fail through a series of years. That is a matter for your determination. A commercial enterprise means where the land is of that quality and character that, with reasonable care and diligence, it would produce the deciduous fruits in reasonable quantities, which, under normal conditions of the market, will return a profit, and that through a series of years, taking one with the other, which will make the enterprise profitable as a whole. Otherwise, it is not commercial. These gentlemen more or less adhere to the view that the land is fitted for commercial orcharding, though Mr. Wanzer said he would not recommend buying land only 22 inches deep, such as the average of the plaintiff's, unless plenty of dynamite was used to blast it up.

It must be remembered, Gentlemen of the Jury, that the representation made by the defendant to the plaintiff was that [118] the land is adapted to commercial orcharding. Not that it can be prepared for commercial orcharding by sufficient expenditure of time and labor to dynamite it. It is fair to say that if you give sufficient time and labor that you might reduce land to a state of commercial orcharding, although originally it was of basic granite.

The book says it is adapted to commercial orcharding, and that was the representation of the

defendant to the plaintiffs, not that it can be prepared at great expense. Mr. Twining says it would cost $20 to $30 an acre to blast it, as he sees it. Mr. Davis says on his experience that it would cost 60 to 75 cents a hole, and that there are 80 to 100 trees to the acre, which would bring it up to something like $48 to $75 an acre, depending on the price.

The defendant also presents Mr. Twining as its expert. You must remember, Gentlemen of the Jury, that when it comes to expert testimony it is the same with reference to any other witness; you are not obliged to believe anything is so simply because some witness swears it is so, whether he is called an expert witness, or not. You test it out by the test of reasonableness, and determine where the truth is. Experts are those assumed to have special knowledge and learning on a particular subject which is not obvious to the average man without such learning, and out of his learning he speaks to you. In so far as you believe he has the learning and is well informed, and honestly expresses his opinion to you, you will give him credit, and no further.

Mr. Twining and Mr. Davis differ very much in respect to this land, even in the chemical analysis, which is supposed to be capable of absolute proof. Of course, there is no such thing [119] as absolute proof in anything. Mr. Davis says he finds only about one-eighth or one-ninth as much potash as Mr. Twining, and one-third or one-fourth as much phosphoric acid as Mr. Twining. In other

words, putting it the other way, Mr. Twining finds that much more than Mr. Davis. Now, what are we to determine when experts thus disagree; where are we people of less knowledge in that particular science to take a stand. It is for you to say. Take all the circumstances of the case as disclosed to you, Gentlemen of the Jury, and determine as to any difference between witnesses, and especially experts, where the truth lies between them, and with which one does it prevail?

Mr. Twining further testifies that this hard-pan is not so deep, two or three inches of hard-pan, and below it is of different character, and that if you blast through the upper portion the water will penetrate the layer and disintegrate it and dissolve it, and that the roots will penetrate it, and there will be afforded drainage and moisture, which he, too, says are essential to the successful growing of these trees.

It is a fair inference, Gentlemen of the Jury, that those witnesses, that is, those better informed—Wanzer, Holmes, Twining, Morley, rather agree with Mr. Davis that shallow soil is not adapted to the successful commercial orcharding, because they all say it must be prepared by blasting; they rather agree with him that five feet is not too much for moisture and for drainage, and the like, because where it does not exist in the deep soil they say you must blast and furnish it below. So there is not so much discrepancy between the experts there. But Mr. Twining and Mr. Davis between [120] the rather essential mineral elements of the land.

And, as I have said, as to which one you will believe, you will determine that for yourselves.

Mr. Twining says this land is adapted to commercial orcharding, if properly prepared by the requisite blasting, and the like. He tells you about other lands in Fresno, Merced, Oroville, the east side of Sacramento, and the like, where, on like lands, commercial orcharding is successfully carried on. Now, it is for you to say whether the lands have been proven adapted to successful commercial orcharding, or, rather, it is for you to say is the defendant's representation that they are adapted to successful commercial orcharding false? That is the question for you. Does that appear by the greater weight of the evidence, that the representation is false? If it does, then the plaintiffs' case is made out thus far.

And, coming to the value of the land, the experts, again, differ. There it is a matter of opinion, but it is a very wide divergence of opinion, and it would look as if opinions were not worth so very much, after all, when men can thus differ. You have the testimony of Mr. Kerr for the plaintiffs, and the testimony of Mr. Geddes for the defendant. Mr. Kerr says that at that time, in 1921—and that is the vital time, Gentlemen, the land was worth $75 an acre. Mr. Geddes said it was worth $350 an acre. Mr. Geddes said it was worth $75 an acre more than the defendant got for it. Mr. Kerr says it was worth $200 less than the defendant got for it. Now, as to those two witnesses one may have gone over that land very quickly; Mr. Kerr may

have looked at it very quickly. I think we can take it for granted that any of you who are engaged in selling goods can go out and, with a very short [121] inspection of like goods, you can determine their value, even though you did not know them for years, and had but a very limited acquaintance with them. Mr. Kerr says that he has been in the real estate business for twenty or twenty-five years, he knows the values, he went to see this particular ten-acre piece a few days ago, and from his general knowledge of conditions—that is substantially his testimony, or the inference to be drawn from it—he thinks it is worth $75 an acre.

Mr. Geddes testifies that he knows the land, knows it very well, knew it when it was in the grant, and that in his opinion it was worth $350 an acre. Now, Gentlemen, it is for you to say what it was worth. You have a fair knowledge of conditions surrounding this city and country prevailing in 1921, and while you are not to substitute your knowledge for the witnesses' it does enable you to determine which witness is speaking truthfully, or wherein between them the truth lies. You will determine how much the land is worth.

Unless you find it is proven by the greater weight of the evidence that the land was less in value at that time than $275 an acre, plaintiffs' case fails, and your verdict must be for the defendant, because even if it were falsely represented to be valuable for commercial orcharding, if it is not proven to be of a value less than what the plaintiffs paid for it, they have not been damaged. You can all

see that at once. A man cannot recover damages, no matter what false representations induced him to buy, if he got as much as his money's worth when he paid for it.

If you find by the greater weight of the evidence that [122] the land is proven to have been worth less than $275 an acre at that time, you proceed to the next step, and that is, that the defendant is not liable in any way unless they knew those representations, or either of them, were false, or unless the defendant ought to have known it, or unless the defendant make the representations in a positive fashion which presumes knowledge, and which it cannot now deny. Did it know if the land was not adapted to commercial orcharding successfully? Did the defendant know it? It had been handling these lands at that time some eight or nine years. I think the book says it sold the first tract out there in this project in 1912. It had experts, horticultur*al*ists—undoubtedly a man is pretty well presumed to know what he owns in respect to its adaptability to any purpose, especially if he has experts in that particular purpose.

Furthermore, if it did not know it, should it not have known it during all these years that it had it, and selling it out in the market to people on these representations that it was valuable for fruit as a commercial enterprise? Moreover, it states in this book that it is proven beyond a doubt. Nothing stronger can be said than that, Gentlemen, that it is proven beyond a doubt that this land is adapted to commercial orcharding.

When they made that representation, Gentlemen of the Jury, the law implies they knew whether it was true or false. If it was false they are bound by it, and would be liable accordingly.

And so in respect to values. If it was not worth $275 an acre, did defendant know it, taking into consideration all their experience with the land? If you find that the defendant did know that the land was not adapted to commercial [123] orcharding, or ought to have known it, or positively asserted, as it did, that it was, the law presumes knowledge, and the plaintiffs' case is so far made, and you proceed to the next step.

The law says the defendant is not liable unless it made the representations with intent to make the plaintiff believe them, and to act on them, and to deal with the defendant. To what end did the defendant make the representations? What does a merchant, or anyone else, put out an advertisement for but to excite the credit of those who read the advertisement and to secure the belief of the prospect and induce him to buy? They certainly do not want you to believe they are lying? They do not want to drive you away. They do not want to defeat the bargaining. They do it for the purpose of bringing about a bargain. So the only reasonable conclusion there, Gentlemen, would be that the defendant did intend to bring the plaintiffs into the bargain. That is all the intent that is necessary. It is not necessary that any agent of defendant should have had in the back of his mind the gross idea, I will cheat these plaintiffs, I will

deceive them, I will defraud them. No. If they intended to make these representations to induce the plaintiff to believe them and to bargain with them, that is the only intent necessary to make the defendant liable. Remember, the defendant speaks only by its agents. Whatever its agents say, whatever its written agent, the book, says, is the language and the statement of the defendant corporation, and it is liable for them.

Then the next step. The law is that unless the plaintiffs believed the representations and did rely upon them, [124] in whole or in part, to some extent, at least, then there is no liability, because if the plaintiffs did not believe them, if they did not influence the plaintiffs to buy the land, they have not been harmed by them, they are simply out of the case, they are superfluous. Did the plaintiffs believe them? They say they did. They were Minnesotans; they knew nothing about California, or California fruit, from the practical side, never having been here. All the knowledge they had they got from defendant's literature, and talking with their neighbors, so they say. They so testified. Remember if your recollection is different from that of the Court, or if your recollection is different from that of counsel as they stated the testimony to you in their arguments, it is your recollection that controls in respect to the evidence.

They say that Amblad came to them after they had read the book first, and told them the same things that were in the book, and that they believed them. He finally told them on the 29th of Sep-

tember, If you don't buy before October 1st the land is going up in price. That appealed to their sense of thrift, and they did sign the contract that night.

It is not necessary that the plaintiff should have intended to start a commercial orchard. If the seller of land attaches to it an attribute of value and the buyer appreciates it gives a value to the land, whether in the present or in the future, if he did want to sell it again, and he is to some extent influenced by that assigned attribute, that is enough to entitled him to recover, if it is false.

So, here, even if the plaintiff had not intended to go into commercial orcharding when it was represented to them that [125] this land was adapted to commercial orcharding, if they appreciated that as something that gave additional value to the land, and they bought it because of it, the mere fact that they did not intend to go into commercial orcharding right away, or at all, is immaterial. But they tell you that they did intend to go into commercial orcharding eventually. They say they followed the plan of the book, which says that there is a long period after planting before the orchard is in bearing; they must have an income in the meantime, they must go into the chicken business. They tell you that Amblad told them that. Amblad says, however, that he did not tell them anything about commercial orcharding, although he talked about fruit, and that they were only talking chickens. After they got here the plaintiffs followed the book, they went into chickens,

and after due course of time they began to grow trees, to test out the land to see what it would do in the way of fruit.

So if you find by the greater weight of the evidence that the plaintiffs believed those representations, and to some extent relied upon them, in whole or in part, and were thereby induced or influenced to some extent to buy by reason of it, the plaintiffs' case is made out thus far. Ask yourselves, What does California stand for in the east, what its trademark is other than climate and fruit. I want to say right here, Gentlemen of the Jury, that the law presumes that all transactions are fair and honest until that presumption is overcome by the evidence in the case. But the resources of California and the state are great enough that they need no false representations to sell them abroad. It is not good for the state. I am not saying [126] there were any. That is left for you. You must not get the idea into your head that just because you are Californians you must uphold the credit of the state and the value of its lands by thinking that that was ordinary puffing for the selling of land, if they were false. If they went beyond that and made false statements, they had no right to do it. You cannot induce any man to enter into a bargain by false statements and escape liability.

Now, the next step. If you find that the plaintiffs were influenced to enter into the bargain, the next question is, were they damaged? If they were not damaged they are not entitled to recover. And that brings you right back again to the question

of the value of the land. If you find the land was worth less than $275 an acre, they are entitled to the difference. If the plaintiff paid $275 per acre for this land and it was not worth that, they are entitled to be made whole in that respect. If you find, and this is simply by way of illustration, that the land was only worth at that time $100 an acre, the plaintiffs should recover the difference between $100 and $275 an acre, or $175 an acre. If you believe it was worth $200 an acre in 1921, plaintiffs would be entitled to recover $75 an acre, and so on. Then there are other damages. The plaintiffs say that after the recommendation was made to them that the land was well adapted to commercial orcharding, they started to try it out with fruit-trees, and they planted some and they died. They did not flourish. Therein they say they spent some hundreds of dollars—$200 for the trees, and to blast the ground and plant them. Cultivation $50. Then they say they spent a certain amount of money for an additional well [127] and a certain plant that otherwise they would not have spent except for the trees. Well, Gentlemen, I rather think that that might take rank, so far as the well and the pump are concerned, of a permanent improvement for whatever purpose they will see fit to adapt the land to, and I think no damages should be allowed for that. In other words, those matters have not been proven with sufficient definiteness. They admit the plant has some value. It is hardly possible to make out any damage there with any reasonable certainty. So I think you will limit

yourselves to the damages on the score of the trees, if you give any damages at all, and to that of the cultivation, and for the blasting of the trees, in such reasonable amount as you may find, not exceeding $250, as you believe plaintiffs to be entitled to, that they have proved that they spent.

But that is not quite all the case, Gentlemen of the Jury. The plaintiffs purchased this land away back in 1921. If they were deceived by false representations, if false representations were made, they were deceived at that time. The law is that they must begin their suit to recover within three years after they discover the fact that they have been deceived. This deception is secret, and plaintiffs are not bound to bring suit until they discover it, and within three years thereafter. The suit was begun on February 6, 1928; so the three years within which they could begin the suit began on February 6, 1925. Unless you find from the greater weight of the evidence that they did not discover the fact that they were deceived before February 6, 1925, they are not entitled to recover in any event. The statute of limitations would run against them. That is the policy [128] of the law, Gentlemen, and in proper cases it must be enforced. They say they did not discover the fact. They say they came here in 1922, and did some building, wherein they discovered some hard-pan down at eighteen inches, but that that did not mean anything to them. If it excited any suspicion, the plaintiff said he went to Mr. McNaughton, the company's horticultur*al*ist, and McNaughton told him

that was not harmful, that all you have to do is to blast that, and that it is really very good for the fruit-trees when blasted, it has lime in it, etc., and is in the nature of fertilizer. I think Mrs. Lindquist testified the same thing, but I don't remember about that. Anyway, that is what the plaintiff Lindquist says McNaughton told him. Well, remembering, Gentlemen of the Jury, that the plaintiff knew nothing about fruit, and knew nothing about land, and what was essential to successful orcharding, and if he believed the representations in the first place, were they not allayed and quieted, if he had any suspicions, by Mr. McNaughton, the company's horticultur*al*ist—by what he said to him? There is no denial that McNaughton said that. The law in respect to that is that the party who has been deceived, when he discovers reason to believe that he has been deceived, must pursue the inquiry with such diligence as a prudent man, in the circumstances, would, when he discovered it is the time when the statute begins to run. He is not required to employ experts in order to discover that. It seems here to be a matter of expert knowledge, or experience, to determine whether land is adapted to commercial orcharding. You have heard the experts differ on it; you have heard men of experience differ on it. The plaintiff came here without experience. He is not obliged to employ an expert to tell him about it. If, believing the representations in the [129] first place, and he then relied on the further representations allaying his suspicions, he is not bound by the limit of

time until he makes the actual discovery. They planted trees in 1924 and 1926; they died after a year or two; they say that for the first couple of years they did fairly well, but that finally they died. Mrs. Lindquist says she went to see Mr. Schei when some of the trees died. Schei was one of the representatives of the company here. He said, so Mrs. Lindquist testifies, "That is nothing; this is a sour sap year; a tree is liable to die any place on occasions." She testifies that Schei said they died once in a while anywhere, this is the year of sour sap, and that sour sap caused it. That was in 1926. There is no evidence, that I remember, that there was any sour sap in 1926, and she says that is what Schei told her. Anyhow, that was after the time when they would be barred. So that may be dismissed from your mind. If you do not find from the greater weight of the evidence that the plaintiff had knowledge before February 6, 1925, or had notice of such facts that with reasonable inquiry they should have had knowledge, then their suit is in time, and they are entitled to recover accordingly.

Now, just a word or two in reference to witnesses. A witness takes the stand to aid you in arriving at the facts in the case. He is supposed to tell you the truth. It is for you to determine how far a witness has testified fully and truthully, how much he knew, whether he knew what he was talking about, and to what extent, and whether he reported it honestly to you. You determine the truthfulness of the witness on the stand the same

way that you do in dealing with men with whom you come in contact in your daily [130] lives; you take note of their demeanor, the reasonableness of what they say to you, whether they are contradicted by previous statements of their own—there has been some evidence tending to show that in this case, or whether they are contradicted by other witnesses whom you prefer to believe, or whether they are contradicted by circumstances. Very often you prefer to believe the circumstances rather than the testimony of any number of witnesses. It is an old saying that you are not obliged to believe anything is so simply because a witness swears it is so. It must first recommend itself to your judgment and to your credibility.

One witness is enough to prove any disputed fact in this case. The mere number of witnesses is not vital. If it were, you can see that one side might throw in a greater number of witnesses than the other. If that were the rule, you might as well take them out and weigh them on a scale and see which is the heavier. That is not the law. If all witnesses appear to be possessed of equal knowledge and equal ability to remember it and report it to you, and of equal honesty therein, then the number of witnesses might be material, and probably would be, to carry weight with you. After all, Gentlemen, it is a matter for your judgment.

When you retire to the jury-room you will select one of your number foreman, and proceed to a verdict. It takes twelve of your number to agree on a verdict in this case.

Any exceptions for plaintiffs?

Mr. McCUTCHEN.—None.

The COURT.—For defendant?

Mr. BUTLER.—We except to the charge as a whole; and particularly, to the instructions on the subject of representations [131] claimed to have been made by defendant to plaintiff, both as to the growing of fruit, and as to the question of value.

We except to the instruction upon the question of the falsity of the representations.

Also to the instruction upon the subject of the knowledge of the falsity on the part of the defendant.

Also to the instruction as to the question of belief on the part of the plaintiffs, and reliance thereon.

Also to the instruction on the measure of damages. Also to the instruction as to the date of the discovery of fraud, if any.

We also except to the failure of the Court to give defendant's proposed Instruction No. 1, upon the matter of the statute of limitations.

We also except to the failure of the Court to give defendant's proposed Instruction No. 2, concerning the effect of the discovery by plaintiffs of the falsity of a material representation.

Also to the failure of the Court to give defendant's proposed Instruction No. 4, concerning distinctions between representations and matters of opinion.

Also to the failure of the Court to give defendant's proposed Instruction No. 5, concerning the effect of plaintiffs having been able by reasonable

diligence to discover the alleged falsity of representations as to value.

We also except to the instruction upon the subject that defendant, by its book, represented plaintiffs' land to be well adapted to the growth of deciduous fruits commercially, and also that the statements in defendant's literature applied [132] to the land *applied to the land* purchased by the plaintiffs.

The COURT.—Gentlemen of the Jury, it is now late, and I propose to leave the building. You will arrive at a verdict, and when you do so the foreman will sign it and place it in an envelope and put it in his pocket, and then you may disperse to your homes, keeping secret the conclusion at which you have arrived, and you will return here to-morrow morning at ten o'clock. You do not separate, Gentlemen, until you have arrived at a verdict.

(Thereupon the jury retired, and subsequently returned into court and rendered a verdict in favor of plaintiffs and against the defendant, and assessed the damages in the sum of $1,800.00.)

Defendant proposes the foregoing as its bill of exceptions on appeal from the judgment in said cause, and prays that it be allowed and settled as such.

J. W. S. BUTLER,
Of the Firm of
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant and Appellant.

Dated: November 24, 1928. [133]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

Inasmuch as the rulings and exceptions specified in the foregoing bill of exceptions do not appear in the record of said cause, I, ————, Judge of the District Court, upon the stipulation of the parties, have settled and signed the said bill, and have ordered that the same with amendments accepted and allowed be made a part of the record of the said cause, this 20 day of December, 1928.

BOURQUIN,
District Judge.

[Endorsed]: Filed Dec. 27, 1928. [134]

[Title of Court and Cause.]

PROPOSED AMENDMENTS TO PROPOSED BILL OF EXCEPTIONS.

Come now the plaintiffs and propose that defendant's proposed bill of exceptions be amended as follows:

1. At the beginning of the bill of exceptions insert: "Defendant's demurrer to plaintiffs' complaint came on regularly for hearing on the 12th day of March, 1928. Defendant appeared by its counsel and consented that this demurrer to plaintiffs' complaint might be overruled."

(If the record of the court supports, allowed. Otherwise disallowed.—BOURQUIN, J.)

2. Page 25, line 2, strike out "evade" and insert in place thereof "avoid."

3. Page 70, line 5, insert: "The cause was thereupon argued to the jury by counsel for the respective parties. In the course of the argument counsel for the defendant admitted that defendant had represented to plaintiffs that the entire tract of land, including the piece sold to plaintiffs, was represented by defendant to be well adapted to the growing of deciduous fruits commercially."

(Nothing to show occurred. Disallowed.—BOURQUIN, J.) [135]

4. Page 85, line 12, correct "1921" to read "1912."

5. Page 87, line 23, correct the word "office" to read "orchard."

6. Page 89, line 20, correct the figure "$200.00" to read "$275.00."

7. Page 90, line 22, correct the word "secrecy" to read "secret."

8. Page 91, line 18, correct name to "McNaughton."

9. Page 91, line 27, correct the word "successful" to read "commercial."

10. Page 92, line 9, after "this is" insert "a" and correct the word "here" to read "year."

11. Page 93, line 3, after "has" insert "been."

12. Page 93, line 7, after "circumstances" insert "rather."

Dated: December 3, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

Due service and receipt of a copy of the within proposed amendments to proposed bill of exceptions is hereby admitted this 3d day of December, 1928.

EDWARD P. KELLY,
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 5, 1928. [136]

[Title of Court and Cause.]

NOTICE OF REJECTION OF PROPOSED AMENDMENTS TO PROPOSED BILL OF EXCEPTIONS.

To the Above-named Plaintiffs, and to Messrs. Ralph H. Lewis and George E. McCutchen, Attorneys for Said Plaintiffs;

PLEASE TAKE NOTICE: That defendant does not accept your proposed amendments numbers 1 and 3 to its proposed bill of exceptions.

The proposed amendments, numbers 2, 4, 5, 6, 7, 8, 9, 10, 11 and 12 are accepted.

Dated: December 6, 1928.

ARTHUR C. HUSTON,
E. P. KELLY,
BUTLER, VAN DYKE and DESMOND,
Attorneys for Defendant.

Service hereof is hereby admitted and receipt of copy acknowledged this 17th day of December, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 18, 1928. [137]

[Title of Court and Cause.]

STIPULATION WAIVING NOTICE OF PRESENTATION OF PROPOSED BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED that defendant's proposed bill of exceptions in the above-entitled cause, with plaintiffs' proposed amendments thereto, and defendant's notice of rejection thereof, except as to the proposed amendments which have been accepted, may be presented to Hon. George M. Bourquin, who presided at the trial of the above cause, for settlement, without further notice or argument.

Dated: December 8th, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.
E. P. KELLY,
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 18, 1928. [138]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FOR SUPERSEDEAS AND COST BOND.

On the filing by defendant of a petition for appeal, with assignment of errors, and on motion of defendant, by its attorneys, IT IS HEREBY ORDERED:

That an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore rendered and entered herein, be, and the same is hereby, allowed.

AND IT IS FURTHER ORDERED that upon the giving by defendant of a good and sufficient bond, in the sum of Three Thousand Six Hundred ($3,600.00) Dollars, and conditioned as required by law, and the rules of this court, all further proceedings in the said court may be suspended and stayed until the final determination of said appeal by the United States Circuit Court of Appeals or by the Supreme Court of the United States, upon a petition for writ of certiorari.

IT IS FURTHER ORDERED that the amount of cost bond on said appeal be, and it hereby is, fixed in the sum of Two Hundred Fifty ($250.00) Dollars, conditioned as required by law and the rules of this court.

The supersedeas and cost bond may be embraced in one document.

A. F. ST. SURE,
United States District Judge.

Dated: Dec. 5, 1928. [139]

Service hereof is hereby admitted and receipt of copy acknowledged this 7th day of December, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 7, 1928. [140]

[Title of Court and Cause.]

SUPERSEDEAS BOND AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Sacramento Suburban Fruit Lands Company, a corporation organized and existing under the laws of the State of Minnesota, as Principal, and Standard Accident Insurance Company, a corporation organized and existing under the laws of the State of Michigan, and authorized under the laws of the State of California and the above-entitled District, to act as sole surety on undertakings of this character, as surety, are held and firmly bound unto H. A. Lindquist and Selma A. Lindquist, the above-entitled plaintiffs, in the full and just sum of Three Thousand Eight Hundred Fifty ($3,850.00) Dollars, to be paid to the said H. A. Lindquist and Selma A. Lindquist, their attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of December, 1928. [141]

WHEREAS, lately at a District Court of the United States for the Northern District of California, Northern Division, Second Division thereof, in a suit pending in said court between said H. A. Lindquist and Selma A. Lindquist, as plaintiffs, and Sacramento Suburban Fruit Lands Company, as defendant, a judgment was rendered against the said Sacramento Suburban Fruit Lands Company in the sum of One Thousand Eight Hundred ($1,800.00) Dollars, and in the further sum of costs amounting to $39.10, and the defendant having been allowed on appeal from the judgment to the United States Circuit Court of Appeals for the Ninth Circuit; and the Court having made an order for supersedeas, staying all proceedings in the District Court pending final determination of said appeal, provided the defendant give a bond in the sum of Three Thousand Six Hundred ($3,600.00) Dollars, conditioned according to law; and the Court having fixed the amount of cost bond on said appeal in the sum of Two Hundred Fifty ($250.00) Dollars, and the Court having ordered that the supersedeas bond and bond for costs might be combined and embraced in one document,—

NOW, THEREFORE, the condition of the above obligation is such that if the said Sacramento Suburban Fruit Lands Company shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the

above obligation to be void; else to remain in full force and virtue.

AND IT IS FURTHER EXPRESSLY AGREED by said surety that in case of a breach of any condition hereof, the above-entitled court may, upon notice to said surety of not less than ten (10) days, proceed summarily in the action in which this bond is given to ascertain the amount which said surety is bound to pay on account of said breach, and to render judgment therefor against it and to award execution therefor. [142]

IN WITNESS WHEREOF, said principal and surety have executed this undertaking, attesting such execution by their respective seals, all on this, the 8th day of December, 1928.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation.

[Seal] By A. E. WEST,

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation.

[Seal] By J. W. S. BUTLER,
Attorney-in-Fact.

State of California,
County of Sacramento,—ss.

On this 8th day of December, 1928, before me, a notary public in and for the County of Sacramento, State of California, personally appeared J. W. S. Butler, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of Standard Accident Insurance Company, and he acknowledged to me that he subscribed the name of Standard Accident Insurance

Company thereto, as principal, and his own name as the attorney-in-fact.

[Seal] GERALD M. DESMOND,
Notary Public in and for the County of Sacramento, State of California.

Form of bond and sufficiency of sureties approved.

Dated: Dec. 11, 1928.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Dec. 12, 1928. [143]

[Title of Court and Cause.]

ORDER TRANSMITTING EXHIBITS.

It appearing to the Court that the exhibits of plaintiffs and defendant, except the perishable exhibits and samples of hard-pan, should be inspected by the United States Circuit Court of Appeals for the Ninth Circuit in their original form,—

IT IS HEREBY ORDERED that said exhibits, except the perishable exhibits and samples of hard-pan, be transmitted by the Clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit in original form, with the bill of exceptions, and need not be printed as part of the record herein.

Dated: January 14th, 1929.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed Jan. 14, 1929. [144]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of Said Court:

Sir: Please prepare a record on appeal containing true copies of the following papers in the above-entitled action:

1. Order removing said cause from the Superior Court of the State of California to the District Court of the United States.
2. Complaint.
3. Demurrer to complaint.
4. Order overruling demurrer.
5. Answer.
6. Minutes of trial.
7. Verdict of the jury.
8. Judgment.
9. Petition for appeal.
10. Assignment of errors.
11. Bill of exceptions.
12. Proposed amendments to bill of exceptions.
13. Notice of rejection of proposed amendments.
14. Stipulation waiving notice of presentation of bill of exceptions.
15. Order allowing appeal.
16. Citation.
17. Supersedeas and cost bond.

18. Order transmitting exhibits.
19. Praecipe for transcript.

J. W. S. BUTLER,
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant and Appellant. [145]

Service hereof is hereby admitted and receipt of copy acknowledged this 22 day of January, 1929.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 22, 1929. [146]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 146 pages, numbered from 1 to 146, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of H. A. Lindquist et al. vs. Sacramento Suburban Fruit Lands Co., No. 473—Law, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is

the sum of Sixty-two and 30/100 ($62.30) Dollars, and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 29th day of Jan., A. D. 1929.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [147]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to H. A. Lindquist and Selma A. Lindquist, Appellees, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Sacramento Suburban Fruit Lands Company, a corporation, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned,

should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Dated: This 5th day of December, A. D. 1928.

A. F. ST. SURE,
United States District Judge. [148]

Due service of within citation is hereby admitted this 7th day of December, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Appellees.

Citation on Appeal. Filed Dec. 7, 1928.

[Endorsed]: No. 5703. United States Circuit Court of Appeals for the Ninth Circuit. Sacramento Suburban Fruit Lands Company, a Corporation, Appellant, vs. H. A. Lindquist and Selma A. Lindquist, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed January 30, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.